THE CONVEYANCER
AND
PROPERTY LAWYER

No. 1. SEPTEMBER, 1936

EDITORIAL.

The general index to the Encyclopedia of Precedents and to the articles in the first 21 volumes of *The Conveyancer* is in preparation and will be delivered to subscribers early next year. There is also being prepared a Noter-Up showing page by page what precedents are obsolete, require alteration, or have been replaced by later forms.

Completion of the Encyclopedia involves some change in policy for *The Conveyancer*. It is intended to continue to supply precedents of special utility, but to devote rather more attention to the accompanying magazine.

The purpose of the precedents will be in part to keep the existing forms up to date and replace any that become obsolete by changes in the law. At the same time additional precedents will be provided which the practice of conveyancers has found desirable and by which the scope of the existing volumes may be extended. In this connection readers are invited to submit to the General Editor, in care of the publishers, any precedents which they have had occasion to draft for their own practice together with any notes thereon that they may think will assist users of the precedent. Payment will be made for all those accepted by him.

By making the journal a quarterly it will be possible to devote more space to individual articles and thereby permit contributors to deal with wider subjects more exhaustively. Together with the articles will be included notes of cases for the current quarter designed not only to give the gist of the decision and the facts upon which it is founded but also to suggest its practical application. The notes will try to cover Landlord and Tenant and Inland Revenue cases so far as they apply to conveyancing as well

as ordinary conveyancing and property cases. As far as possible, notes on current Statutes and Rules and Orders will be included.

All the articles will be of a practical character but designed to cover different aspects of the needs of the practitioner. Certain aspects of the law of conveyancing, mainly under the 1925 legislation, still afford considerable difficulty, and it is proposed to include articles on these subjects, as, for instance, the problem of concurrent interests in land, which is dealt with in one respect in an article in the current number. Some of the other branches of the law are not readily accessible in the ordinary precedent books and it is intended to supplement these, as by the articles dealing with the scope and application of the General Conditions of Sale, the first of which appears in this number.

Where changes are made by statute or important decisions, these will, as far as possible, also be treated in articles designed to examine the law and its application to conveyancing. Finally, certain articles will deal with matters of interest not generally met with by the practitioner but which may crop up in the course of practice. In these articles attempt will be made to examine the whole of the law so as to enable a practitioner to deal adequately with any problem by reference to the volume concerned. It is hoped that, apart from their practical application, these articles will be read with enjoyment by those concerned with our law of property and conveyancing.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

The object of these articles is to consider the more usual conditions of sale now used in connection with the sale of freehold and leasehold land, and the effect of such conditions. Incidentally it will be necessary in many cases to consider the position of the parties in the absence of any special provision governing the particular matter under discussion. It must be borne in mind that even under an open contract so called, the position may be governed by the Law of Property Act, 1925, or by some other statute, or by decisions of the Courts, or the contract may fall within that nebulous class of agreements known as contracts by correspondence to which the Lord Chancellor's Statutory Conditions of Sale apply. What is a contract by correspondence is more easily answered by an illustration than a definition. Thus, if parties exchange letters by post, and such letters constitute a clear offer for sale of a specified property and an unqualified acceptance of such offer, no doubt a contract has arisen by correspondence. If on the other hand the parties arrange for the settlement of a short contract by their respective solicitors, and such contract, by arrangement between the solicitors, consists of letters formally addressed by each party to the other, as is sometimes done in cases of urgency, it seems very doubtful whether such a contract is a contract by correspondence of the kind to which the Statutory Conditions of Sale apply. Again, if the parties, without legal advice, meet together and reduce their bargain to writing in the form of letters of offer and acceptance it is by no means certain that the contract so created is a contract by correspondence. The question is whether regard is to be had to the form in which the contract is framed, or whether the contract must in fact have been formed by the interchange of correspondence in the normal sense of that term. It is obvious that in many cases the question whether the bargain struck at a meeting of the parties takes the form of letters or of one document must be a mere matter of chance, and it is surprising that no effort whatever was made, either by the Legislature or by those respon-

sible for framing the Order under which the Statutory Form of Conditions of Sale was issued, to state exactly what was intended by the term " contract by correspondence ". The writer favours the view that the Statutory Form applies only to cases where letters have passed between the parties in course of post or by hand, and not to cases where, at a meeting, a contract is evolved which takes the shape of letters merely as a convenient form of offer and acceptance. There appears, however, to be no authority upon this question, and the writer's view is expressed with due diffidence and a full appreciation of the arguments which may be adduced in support of the contrary view.

The Order prescribing the Statutory Form of Conditions of Sale was made on August 7, 1925, pursuant to section 46 of the Law of Property Act, 1925, which provides as follows :—

" The Lord Chancellor may from time to time prescribe and publish forms of contracts and conditions of sale of land, and the forms so prescribed shall, subject to any modification, or any stipulation or intention to the contrary, expressed in the correspondence, apply to contracts by correspondence, and may, but only by express reference thereto, be made to apply to any other cases for which the forms are made available."

The provisions of the Statutory Form of Conditions of Sale are preceded by a note stating that these conditions will apply to contracts for the sale of land by correspondence, subject to any modification or any stipulation or intention to the contrary expressed in the correspondence. The note also states that they may by express reference thereto be made to apply to any contract for the sale of land, and may for this purpose be cited as the Statutory Form of Conditions of Sale, 1925.

It is not proposed, at this stage, to deal in detail with this Statutory Form, but reference to its provisions will be made later, if space permits, when dealing with particular " common form " conditions.

Owing to the exigencies of modern affairs it has become a very usual practice to incorporate by reference certain standard Conditions of Sale, and those most commonly employed are the Law Society's Conditions of Sale, 1934, and the (so-called) National Conditions of Sale issued by the Solicitors' Law Stationery Society, the latter being originally settled by Mr. T. Cyprian Williams and later by Sir Benjamin Cherry. The practice referred to has grown notwithstanding considerable resistance upon the ground that such forms include in the majority of cases many clauses which are unsuitable or have no relation whatsoever to the subject-matter of the particular contract.

These forms do, however, involve a considerable saving of time for the vendor's solicitor, and also act as an insurance against mistakes in the draft contract, since the material to be written or typed is reduced to a minimum. They also save the purchaser's solicitor some little time in relation to the reading and examination of the engrossments on exchange.

It is, however, to be feared that the same urgency which leads the vendor to resort to the use of standard forms also tends to cause the purchaser's solicitor to accept them without too minute a consideration of their application and field of operation. More objectionable, in the writer's view, is the practice of certain Provincial Law Societies which issue their own local or County Law Society's Conditions of Sale, not by way of additional special conditions, but as a complete set of conditions. If such forms were employed only in cases where the solicitors concerned were practising in the locality of the Law Society in question the practice would no doubt operate satisfactorily as the form would very shortly become familiar to the practitioners concerned.

What actually happens, however, is that solicitors in London and other parts of the country receive, perhaps, within the course of a few days, contracts incorporating, for example, the Manchester Law Society's Conditions, the Sussex Law Society's Conditions, the Hampshire Law Society's Conditions, and the Stockport Law Society's Conditions respectively, with the result that a detailed perusal of each of these sets of conditions has to be made. It should be admitted that in certain cases local Law Societies merely adopt the "Law Society's Conditions of Sale, 1934", and set out the additional or substituted special conditions which they consider to be suitable; but this practice is not general.

Possibly representations may in due time be made which will have the result of standardising conditions of sale all over the country, in substitution for the present practice of issuing numerous standard forms for the several geographical areas in which the various Law Societies operate. It is believed that the Law Society (London) would welcome this step.

The "Law Society's Conditions of Sale, 1934," are already so voluminous and comprehensive that there should be no difficulty in adopting these conditions throughout the country, the local Law Societies adding or substituting such further or alternative conditions as may be required. This has already been done by a number of local Law Societies.

As the Law Society's Conditions of Sale, 1934, are in very general use in London and may be taken as a normal set of conditions, it is proposed in the ensuing articles to deal in detail with

such of those conditions as are, in practice, likely to call for careful consideration, and where suitable to refer to other forms of condition which may be employed in relation to the same or an allied subject-matter. Whilst discussing each condition and its effect it will be convenient to consider (i) the position of the parties in the absence of any such condition and (ii) the bearing of any particular statute or decision of the Courts upon the interpretation and ambit of that condition.

The Council of the Law Society have kindly authorised the reproduction of these Conditions in this and the ensuing articles.

Law Society's General Conditions.

AUCTION.

1.—In a sale by auction—

(1) The highest bidder shall be the purchaser.

(2) The vendor reserves the following rights—

(a) to divide the property into lots and to sub-divide any lot;

(b) to fix a reserve price for the property, and, for each lot where the property is sold in lots;

(c) to bid up to any reserve price, by himself or his agent;

(d) where the property is sold in lots, to rearrange or consolidate any lots;

(e) without disclosing any reserve price, and whether or not the sale has commenced, to withdraw from the sale, any property or lot, not actually sold at the auction.

2.—In a sale by auction—

(1) No person shall—

(a) on each bidding, advance less than the sum to be fixed by the auctioneer, who shall have power to refuse any bid.

(b) retract a bidding.

(2) If any dispute shall arise as to any bidding, the property or lot in dispute shall either be put up again at the last undisputed bidding, or the auctioneer may determine the dispute.

In relation to the preparation of conditions affecting sales by auction the provisions of the Sales of Land by Auction Act, 1867,

must be borne in mind. That Act contains provisions to the following effect :—

(i) By section 4 of the Act it is provided that in all cases in which a sale of land by auction would be invalid at law by reason of the employment of a "puffer" (that is, a person employed to make fictitious bids with the object of obtaining an advance in the bidding of genuine bidders), such sale is to be deemed invalid in equity as well as at law. This requires explanation. According to the common law, where the sale had been stated to be without reserve the employment of even one puffer rendered the sale void : *Thornett* v. *Haines*, 15 M. & W. 367. This rule also applied where it was stated that the highest bidder should be declared the purchaser, and even to cases in which the vendor's right to bid was not expressly reserved although the sale was not stated to be without reserve. See *Green* v. *Baverstock*, 32 L. J. C. P. 181, where it was held that although the sale had not been advertised as being without reserve, the undisclosed employment of a puffer was evidence for the jury in support of the defence of fraud. In equity it was, however, considered that the employment of one puffer with the object of avoiding a sale below the market price should not invalidate the sale unless the property had been offered, whether expressly or impliedly, without reserve. The Sale of Land by Auction Act, 1867, restored the common law rule.

(ii) Section 5 of the Act provides that "the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person".

(iii) Section 6 enacts that where the sale was "subject to a right for the seller to bid, it shall be lawful for the seller or any *one* person on his behalf, to bid at such auction in such manner as he may think proper".

It must be noted that if the vendor desires to employ a puffer or to bid himself in order to prevent a sale at an undervalue, it will not suffice to provide in the conditions that the sale is subject

to a reserved price. Such a provision will enable the auctioneer to withdraw the property if the reserve price is not reached, but will not authorise fictitious bidding. Such a right of bidding or "puffing" must be expressly reserved: *Gilliat* v. *Gilliat* (1869), 9 Eq. 60.

There is indeed a *dictum* of Turner, L.J., in *Dimmock* v. *Hallett* (1866), L. R. 2 Ch. 26, that although the reservation of a right of bidding is inconsistent with a sale advertised as "without reserve", yet in such a case the two provisions may be read together, and if a purchaser knows that the vendor may bid he cannot be discharged from his contract on the ground that the vendor has bid against him. The case last mentioned was, however, decided prior to the Sale of Land by Auction Act, 1867, and the case of *Gilliat* v. *Gilliat* (*supra*) shows that section 5 of the Act has been interpreted as meaning that where a right to bid is required it must be expressly reserved. The section provides that it must be stated whether the land will be sold "without reserve or subject to a reserved price, *or* whether a right to bid is reserved"; but we have already seen that in *Gilliat* v. *Gilliat* (*supra*) it was held that *both* the right to bid and the fact that there is a reserve price must be stated if the vendor intends to bid personally or by his agent. Where the sale is stated to be without reserve section 5 expressly prohibits bidding by any person on the vendor's behalf.

In the recent case of *Hills & Grant, Ltd.* v. *Hodson*, [1934] Ch. 53, it was held that the words of the statute need not be strictly followed. The requirements of the section as to the sale being "subject to a reserved price" were held to be satisfied by the National Conditions of Sale (11th Edition), clause 1 (1) of which provided that "subject to a right for the vendor by himself or his agent to . . . bid up to a reserve price and to withdraw the property or any lot (not actually sold at the auction) without declaring such price, the highest bidder shall be the purchaser". It was contended on behalf of the purchaser, who was resisting specific performance of the contract, that as there was no express mention that the sale was to be subject to a reserve, the reservation in the condition of a right for the vendor to bid up to a reserve was inapplicable, but this contention was rejected. It should, however, be mentioned that in this case the special conditions which incorporated by reference the general provisions of the National Conditions of Sale stated that "In the event of the property (Lot 2) . . . being bought in by the vendors" the auctioneer should be entitled to withdraw Lot 3 from the sale. This provision could only be intelligible upon the assumption that there

was a reserve price, as otherwise the vendors could not possibly buy it in.

It will have been observed that section 6 of the Act permits the employment only of the seller himself or of *one* person to bid on his behalf. (And see *Parfitt* v. *Jepson*, 46 L. J. C. P. 529, which also decided that where a second bid was made on the vendor's behalf and the vendor had only reserved the right to bid once, the sale was rendered invalid.)

The employment of more than one person to bid has, both at law and in equity, always been considered to be fraudulent: *Crowder* v. *Austin*, 3 Bing. 368; *Wheeler* v. *Collier*, M. & M. 126.

If an auctioneer is not specifically instructed as to a reserve price he has implied authority to sell without reserve, so that the vendor would be bound by a memorandum of sale signed by the auctioneer at the sale in such a case: *Rainbow* v. *Howkins*, [1904] 2 K. B. 322; *Mason* v. *Armitage*, 13 Ves. 25.

If the auctioneer, by oversight, accepts a bid of a sum less than the reserve price, then the auctioneer may withdraw such acceptance before signature of the memorandum and may refuse to confirm the sale. It is of course assumed for this purpose that the property has been sold under a condition stating that the property is offered subject to a reserve price, the whole basis of this rule being that the bidding is upon the express understanding, binding upon the vendor and all bidders, that the property will not be sold below the reserve price fixed by the vendor: *McManus* v. *Fortescue*, [1907] 2 K. B. 322. Where a sale is advertised by an auctioneer, who discloses his principal and states that the property will be sold without reserve, the auctioneer is under no personal liability in respect of any proceedings by a person who claims to have been the highest bidder: *Mainprice* v. *Westley* (1865), 6 B. & S. 420. On the other hand, if the property is advertised by the auctioneer for sale without reserve and no disclosure of his principal is made, he incurs personal liability, as he is deemed to have given a personal undertaking to sell without reserve and is accordingly liable in an action by the highest bidder: *Warlow* v. *Harrison* (1858), 28 L. J. Q. B. 18; 29 L. J. Q. B. 14; 1 E. & E. 295. He cannot escape liability on the mere ground that he is described as an auctioneer: *Franklyn* v. *Lamond* (1847), 16 L. J. C. P. 221; 4 C. B. 637.

It has been held that the acceptance by an auctioneer of a bid which is in fact fictitious, but not known by the vendor or the auctioneer to be fictitious, will not enable a higher bidder who is declared the purchaser to resist proceedings for specific perform-

ance of the contract : *Union Bank* v. *Munster* (1887), 57 L. J. Ch. 124; 37 Ch. D. 51.

It is usual, as in Condition 1 (2) (e) above, to reserve the right to withdraw from the sale, whether or not the sale has commenced, any property not actually sold. It is, however, to be observed that the *bona fide* advertisement of a proposed sale does not bind the vendor to hold the intended sale, and a person damnified by attending at the proposed place and time cannot recover damages in respect of travelling or other expenses incurred by him if the sale does not take place : *Mainprice* v. *Westley* (1865), 34 L. J. Q. B. 229; 6 B. & S. 420.

It is also usual, as in Condition 2 (1) (b), to provide that no person shall retract a bidding, but it appears to be the prevailing opinion that such a condition is not enforceable. It is an elementary principle of law that an offer, not under seal, made without consideration may be withdrawn at any time before acceptance; see *e.g.*, *Cooke* v. *Oxley* (1790), 1 R. R. 783; 3 T. R. 653; *Routledge* v. *Grant* (1828), 6 L. J. (o.s.) C. P. 166; 4 Bing. 653. A bid may be regarded as being in the nature of an offer to purchase upon the terms of the auction conditions. It can hardly be regarded as an acceptance of an offer constituting a completed bargain, since there may be higher bids. Moreover, we have seen that the representation that property will be sold by auction does not create either a contract with or warranty to persons attending the sale that the property shall in all events be sold (*Harris* v. *Nickerson* (1873), 42 L. J. Q. B. 171; L. R. 8 Q. B. 286), except that where a property is advertised for sale without reserve and the auction actually takes place, the vendor cannot refuse to carry out a sale to the highest bidder : *Johnston* v. *Boyes*, [1899] 2 Ch. 73, 77. In such a case, it has been held, the purchaser may sue upon the contract that the conditions of sale must be carried out and section 4 of the Statute of Frauds (now replaced by section 40 of the Law of Property Act, 1925) which requires a contract for the sale of land to be put in writing has no application : *Johnston* v. *Boyes* (*supra*). The principle applicable to such cases is, however, that the property has been, or ought to have been, knocked down to the purchaser as the highest bidder, and it is generally accepted that the sale is not complete until the fall of the hammer. Thus, as to the sale of goods, it is enacted by section 58 (2) of the Sale of Goods Act, 1893, that " a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid." Incidentally it has been held in a Scottish case in relation to the section just quoted that the

vendor is also at liberty to withdraw the goods at any time before the fall of the hammer : *Fenwick* v. *Macdonald* (1905), 6 F. 850.

It might, however, be held that where the conditions of sale expressly declare that the purchaser shall not retract his bid, the principle which was applied in *Johnston* v. *Boyes* (*supra*) is equally relevant *vis-à-vis* the purchaser, and that the vendor may sue, as upon a contract that the conditions of sale bind both vendor and seller and compel the purchaser to implement the bargain. It will be remembered that the auctioneer is deemed to be the agent for the purchaser (as well as the vendor), to sign the necessary memorandum of sale, and it may be that such a memorandum so signed, after refusal by the auctioneer to accept the withdrawal of a bid, would create as against the purchaser a valid memorandum of the sale so as to satisfy the requirements of section 40 of the Law of Property Act, 1925. The point is not free from doubt; but as above stated the more general opinion of text-book writers appears to be that a provision purporting to prohibit the withdrawal of a bid is invalid.

It may be convenient at this stage to deal with the question of the authority of the auctioneer to sign a memorandum of the sale. Broadly speaking the authority of the auctioneer in this respect is an authority to create such a memorandum contemporaneously with the sale. This does not mean that the memorandum must be signed by the auctioneer actually in the sale room; but it is usually so signed, and it must certainly be signed within a short time thereafter. It might, for example, be inconvenient actually at the moment of the sale to complete the details of the sale and to sign them, and the completion of the memorandum might therefore be left until the auctioneer had, later in the day, returned to his office. Signature at such a stage would bind the purchaser (*Chaney* v. *Maclow*, [1929] 1 Ch. 461); and in an Irish case, *McMeekin* v. *Stevenson*, [1917] 1 Ir. R. 348, signature by the auctioneer on the morning following the sale was held binding on *the vendor*. Generally, however, the auctioneer already has the property in hand for sale and has standing instructions as to the auction. It may therefore be considered that his authority to sign the memorandum on behalf of the vendor is less transitory than his authority to sign on behalf of the purchaser. It is at least clear that if the auctioneer allows a week to elapse after the sale before signing the memorandum on behalf of the purchaser, his signature thereafter is ineffective : *Bell* v. *Balls*, [1897] 1 Ch. 663; and cf. *Mews* v. *Carr* (1856), 1 H. & N. 484; 26 L. J. Ex. 39. The *dicta* in the ruling decisions are to the effect that the memo-

randum must be signed substantially as part of the proceedings of the auction, and at or immediately after such auction.

Although not a matter strictly touching upon the framing or effect of conditions of sale it may be mentioned that where it was agreed between A and B that A would put up for sale by auction his property and the price to be paid by B was to be a fixed figure plus 20 per cent. above the price which the property might "realise" at the auction, and A after advertising the sale withdrew the property from auction, it was held that B was entitled to take the property at the fixed figure without any addition by way of percentage: *Langstaff* v. *Nicholson* (1858), 25 Beav. 160.

Law Society's General Condition.

VALUATIONS, DEPOSIT, COMPLETION, ETC.

3.—(1) Where the contract requires the purchaser to take and pay for any things at a valuation the valuation shall be made in manner following—

(i) Each party (the vendor and purchaser), or their respective solicitors, shall, as soon as possible after the sale and in any case within ten days after being required in writing by or on behalf of the other party so to do, appoint by writing a valuer, and give notice in writing to the other party of the name and address of the valuer appointed by him:

(ii) The two persons so appointed shall make the valuation, but, before they commence their duties, they shall, in writing, appoint an umpire:

(iii) The decision of the two valuers, if they agree, or of their umpire, if they disagree, shall be final:

(iv) Each party shall pay a moiety of the costs of valuation unless on reference to an umpire he shall otherwise direct.

(v) If either party shall neglect or refuse—

(a) to appoint a valuer,

(b) to give notice of the appointment,

in the manner and within the time aforesaid,

the valuer (if any) appointed by the other party shall make the valuation, and his valuation shall be final.

(2) Where the contract specifies the amount to be paid by the purchaser (in addition to his other purchase money) for

any things the amount so specified shall for the purposes of these conditions be treated as the amount of a valuation under this condition.

(3) In these conditions "purchase money" includes the amount of a purchaser's bidding together (except for the purposes of the deposit) with the amount of any such valuation.

As to the provision that the parties shall appoint valuers, the condition that notice shall be given to the other party is really superfluous, as it is essential to the validity of the appointment that notice of the appointment should be given to the other party: *Thomas* v. *Fredericks* (1847), 16 L. J. Q. B. 393; 10 Q. B. 775.

Where the contract provides that articles should be taken at a valuation, each party to appoint his own valuer and that in the event of disagreement the decision of the umpire shall be conclusive, the Court has no jurisdiction to set aside the umpire's valuation, the umpire being merely a valuer substituted for other valuers and not an "arbitrator". This was decided in the case of *Re Carus-Wilson & Greene* (1886), 18 Q. B. D. 7; 56 L. J. Q. B. 530. As was observed by Lord Esher, M.R., in that case, "If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of an official inquiry, and hear the respective cases of the parties, and decide upon evidence laid before them, then the case is one of arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration, but one of mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and arguments. In such cases it may be difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."

It appears that where it is stipulated that the purchaser of a lot shall take the timber on the lot at a price named by the auctioneer, and the auctioneer has by mistake omitted the value of the timber on part of the lot, the purchaser may take the property and the whole of the timber at the agreed figure, and is not bound to submit to a valuation of the timber so omitted from

the valuation : *Swaisland* v. *Dearsley* (1861), 30 L. J. Ch. 652; 29 Beav. 430.

Where the method of valuation is stated in the conditions it must be adhered to, and the Court cannot interfere; but the mere fact that a valuation of chattels has to be made in order to determine the total amount payable upon the sale of a freehold or leasehold property and chattels therein is no ground for refusing specific performance of the contract so far as relates to the land : *Jackson* v. *Jackson* (1853), 22 L. J. Ch. 873; 1 Sm. & G. 184. And it would seem that where it is agreed that a property should be purchased at a certain price and certain chattels are to be valued by valuers agreed upon and taken by the purchaser and the vendor refuses to complete or to appoint a valuer, a decree of specific performance may be made against the vendor in respect of the freehold or leasehold property alone : *Richardson* v. *Smith* (1870), 39 L. J. Ch. 877; 5 Ch. App. 648. As to the chattels, if the vendor refuses to allow the agreed valuer to enter to make the valuation the Court will make a mandatory order to compel the vendor to allow entry by the valuer for the purpose of making such valuation : *Smith* v. *Peters* (1875), 44 L. J. Ch. 613; L. R. 20 Eq. 511.

In general, a contract for sale of land and the timber thereon (even if such timber is to be taken at a valuation), is regarded as an entire contract, and is specifically enforceable as such : *Crosse* v. *Lawrence* (1852), 21 L. J. Ch. 889, 9 Hare 462; *Crosse* v. *Keene* (1852), 21 L. J. Ch. 892, 9 Hare 469. In this connection it should be remembered that if there is no provision for valuation the timber and also the fixtures will pass to the purchaser on the sale without any additional payment in the absence of any stipulation in the agreement for sale.

Whilst the Court may assist by granting an order to compel a vendor to permit entry for the purposes of an agreed valuation (see *Smith* v. *Peters* (*supra*)), it will not grant any order which is at variance with the bargain between the parties and if the parties elect to nominate a party to make the valuation and such party fails to do so, or the parties' agreed valuers fail to agree the price, the Court is powerless to assist : *Milnes* v. *Gery*, 14 Ves. 400; *Cooth* v. *Jackson* (1801), 6 Ves. 12, 34. It has therefore been suggested that the conditions of sale should expressly provide that if for any reason the valuation shall not be made then the purchaser shall take the chattels in question " at a fair valuation " or " at their fair value ".

The Court can then refer the matter for determination of the

value of the articles in question : *Marsh* v. *Jones* (1889), 40 Ch. D. 563; and cf. *Milnes* v. *Gery* (*supra*).

In this connection the provisions of sections 8 and 9 of the Sale of Goods Act, 1893, are relevant. Those sections provide as follows :—

8.—(1) *The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.*

(2) *Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.*

9.—(1) *Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.*

(2) *Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.*

Sub-section 2 of section 8 does not apply to cases in which the price is to be such as the parties may agree. Here no contract can arise unless and until the parties actually agree upon the value (see *Loftus* v. *Roberts* (1902), T. L. R. 532 (C. A.)), as the parties have expressly excluded its application by the terms of their own agreement : *Martineau* v. *Kitching* (1872), 41 L. J. Q. B. 227; L. R. 7 Q. B., at p. 456.

As to section 9 it will be seen that although the contract is normally avoided where the price is to be fixed by valuation and the valuer cannot or does not make the valuation, this does not apply if the goods are "delivered to and appropriated by" the buyer, *i.e.*, if he takes possession of the goods for his own benefit. In such a case he must pay a reasonable price for the goods.

In some cases the conditions provide that the price is to be fixed by arbitration under the Arbitration Acts, in case the parties do not agree a price. Here the Court may appoint an arbitrator to determine the value of the articles. This course is followed in the 13th edition of the National Conditions of Sale, issued by the Solicitors' Law Stationery Society, clause 2 (2) of those conditions providing that, "Where it is stipulated that any sum shall be fixed or matter settled by valuation or arbitration the same shall be fixed by two arbitrators or their umpire under the Arbitration Act, 1889."

In the case of the Law Society's Condition No. 3, above set out, the point now under consideration is ingeniously covered by sub-clause (v) which, in case of default by either party, enables the other party's valuer to make a valuation alone, and such valuation is binding on the party in default. This provision does not, however, cover the case in which the valuer refuses either to agree the valuation with the other valuer or to agree upon and appoint an umpire. It will probably very rarely happen that the valuers will refuse to agree upon an umpire; but where heavy sums are involved it might be well to add a further sub-clause as follows :—

"(vi) If the two valuers shall not have agreed the valuation and shall not have appointed an umpire at least [14] days prior to the day fixed for completion either the vendor or the purchaser may at any time thereafter apply to [the President for the time being of the Chamber of Commerce] to nominate a competent person to make such valuation.

Any such application shall be made in the name of both parties.

Upon the appointment being made and communicated to the party making the application he shall give notice in writing to the other party of such appointment.

Any valuation made by the valuer so appointed after service of notice as aforesaid on the other party shall be binding upon both parties and on the other hand any valuation agreed by the two valuers or made by their umpire after service of such notice shall be null and void.

The expenses of any valuation made pursuant to this sub-clause shall be borne by the vendor and the purchaser in equal shares."

As to conditions concerning arbitration it should be remembered that the Arbitration Act, 1889, is now to be read in conjunction with the Arbitration Act, 1934.

Law Society's General Condition.

DEPOSIT.

4.—(1) A purchaser, at the close of the sale to him shall pay a deposit of £10 per cent. on the amount of the purchase money and sign an agreement in the form subjoined to these conditions, for the completion of his purchase, according to these conditions, but subject to the variations, if any, contained in the contract.

(2) The deposit shall be paid—

(a) in a sale by auction, to the vendor's solicitors, unless by local custom it is payable to the auctioneers,

(b) in a sale by private treaty, to the vendor's solicitors.

(3) The said solicitors or auctioneers shall take and give a receipt for the deposit as stakeholders.

"The deposit", as Lord Macnaghten said in *Soper* v. *Arnold* (1889), 14 App. Cas. p. 435, "serves two purposes : if the purchase is carried out it goes against the purchase money; but its primary purpose is this, it is a guarantee that the purchaser means business."

If the deposit is paid, upon a sale by auction, to the auctioneer, it is held by him, in the absence of any express stipulation in the conditions of sale, as stakeholder, and not as agent for the vendor : *Lee* v. *Munn* (1817), Holt N. P. 569; *Edgell* v. *Day* (1865), 35 L. J. C. P. 7; L. R. 1 C. P. 80; *Furtado* v. *Lumley* (1889), 6 T. L. R. 168.

On the other hand if the deposit is paid to the vendor's solicitor and no stipulation is made as to the capacity in which he is to receive it, he will hold it as the vendor's agent and must therefore pay it over to the vendor on demand : *Ellis* v. *Goulton* (1893), 62 L. J. Q. B. 232, 1 Q. B. 350; *Gray* v. *Gutteridge* (1827), 3 C. & P. 40; *Burrough* v. *Skinner* (1770), 5 Burr. 2639.

So, if the deposit is paid to an estate agent or to an auctioneer acting as an estate agent for the vendor in connection with a sale by private treaty the agent or auctioneer in such a case is acting solely on behalf of the vendor and would therefore hold as the vendor's agent and not as stakeholder.

The question sometimes arises whether the vendor's agent, whether an auctioneer, solicitor, or estate agent, is liable to pay interest on the moneys received by him by way of deposit. Whether the money is received solely as agent for the vendor or as stakeholder the person receiving it is not, in the absence of instructions, liable to invest it or to pay interest upon it. The following distinction must, however, be noted :—

(1) If the money is received by the agent, auctioneer, or solicitor solely as agent for the vendor, any interest or profit of any sort which is made by investment, deposit at a bank, or by any other use of the money belongs to the vendor and must be paid over accordingly : *Rogers* v. *Boehm* (1799), 2 Esp. 704; *Benson* v. *Hawthorn* (1842), 1 Y. & C. C. C. 326, 57 R. R. 351; *Tyrrell* v. *Bank of London* (1862), 10 H. L. Cas. 26.

(2) If the money is received as stakeholder between the parties it is his duty to keep the stake money intact and to account for it immediately upon demand, and if in fact he makes any investment or other use of it he is not liable to pay over any interest or profit earned thereby: *Harrington* v. *Hoggart* (1830), 9 L. J. (o.s.) K. B. 14; 1 B. & Ad. 577.

The basis of the above distinction is that in the first case the agent's duty is to hand over the deposit at once so that the vendor may have the use of it and any profit from such use; but in the latter case it is recognised that it is the agent's duty, as stakeholder, to retain the money, so that the vendor could not in any event properly claim to be entitled to the profits pending the release of the stake money.

Whether the deposit is held by the agent as stakeholder or as agent for the vendor, he is liable to pay interest thereon after demand for payment, provided that notice is given to the agent that interest will be claimed, although in the case of stake money such demand cannot properly be made without the authority of all persons interested in such money. The liability to pay interest arises out of sections 28 and 29 of the Civil Law Procedure Act, 1833. (Previously interest was only recoverable by virtue of usage of particular trades or express contract.)

If the deposit is misappropriated by the vendor's agent, then if the deposit was paid by the purchaser to the agent with the authority of the vendor, express or implied, or if the vendor accepts the contract on the basis that the agent holds the deposit, the loss will fall on the vendor; see *dicta* in *Sanderson* v. *Walker* (1807), 13 Ves. 601; *Fenton* v. *Browne* (1807), 14 Ves. 144; *Smith* v. *Jackson* (1816), 1 Madd. 618, and *Rowe* v. *May* (1854), 18 Beav. 613.

A trustee vendor will not, however, be liable to his beneficiaries in respect of any loss unless it is shown that he has acted without due circumspection, or has been negligent: *Edmonds* v. *Peake* (1843), 13 L. J. Ch. 13; 7 Beav. 239.

Except in cases where it is known that the financial position and integrity of the vendor is beyond question, as in the case of a sale by a joint stock bank, or certain well-known insurance companies, it is important that the deposit should be paid to the vendor's solicitors as stakeholders, so as to protect the purchaser against the loss of the stake money in the event of the bankruptcy or defalcation of the vendor. As has been seen, the bankruptcy of the stakeholder or even the misappropriation of the moneys by the stakeholder will not prejudice the purchaser; but if the

vendor is allowed to receive the deposit and misappropriates it, or becomes bankrupt, the purchaser may be prejudiced. For example, the vendor may be unable to make a satisfactory title with the result that the purchaser is entitled to claim the repayment of the deposit. The vendor may by that date have disappeared or may have misappropriated the deposit, and be without moneys with which to make it good, in which case the loss would fall on the purchaser. The National Conditions of Sale contain a marginal note to the effect that where the vendor is in a fiduciary position the deposit should not be paid to stakeholders. A similar practice was sanctioned by the earlier editions of the Law Society's Conditions (then known as the General Conditions of Sale). When the third Edition was issued in 1935, however, this condition was altered to provide that the deposit should be received by the auctioneer or solicitor as stakeholder in all cases.

In permitting the deposit to be paid to an auctioneer or solicitor of good repute as stakeholder fiduciary vendors are following the ordinary course of business, and have been held to be justified in doing so : *Edmonds* v. *Peake* (*supra*). Both in that case and in *Ellis* v. *Goulter*, [1893] 1 Ch. 350, such a stakeholder is judicially described as agent for both parties. The practice in question has the high authority of the late Mr. Cyprian Williams (see articles 71 L. J. 162 and 180), and further professional authority is found in a lecture by Mr. Galbraith, K.C., reported in 71 Solicitors' Journal, p. 347, and in Mr. Lightwood's note, 14 Encyclopedia of Forms, 2nd edition, p. 279. There would therefore appear to be no sufficient reason for insistence upon the payment of the deposit to the vendors direct where they are acting as trustees or in some other fiduciary capacity.

Law Society's General Condition.

COMPLETION AND APPORTIONMENTS.

5.—(1) A purchaser shall pay the balance of his purchase money, on the date fixed for completion by the contract, or if no date is so fixed, on the first day after the expiration of seven weeks from the date of the contract (or if that day is a Sunday, Christmas Day, Good Friday or Bank Holiday, on the next following working day), which date so fixed, or the first day aforesaid, or the said first following working day, is, in these conditions, referred to as "the date fixed for completion".

(2) Completion shall take place at the office of the vendor's

solicitors mentioned in the contract, or, if so required by the vendor, at the office of the solicitors of his mortgagees (if any). If there are no such solicitors then at such place in England or Wales as the vendor may notify, in writing, to the purchaser within ten days after the date of the contract.

(3) (a) A purchaser paying his purchase money, or, where a deposit is paid, the balance thereof, shall (but subject to the execution of any conveyance which ought to be executed by him), as from the date fixed for completion, be let into possession or receipt of rents and profits.

(b) A purchaser shall, as from that date, pay all outgoings, and up to that date all current rents, and all rates, taxes, and other outgoings, shall, if necessary, be apportioned, and the balance shall be paid by or allowed to a purchaser on actual completion, and for this purpose a purchaser shall be liable to pay a proportionate part of the current rents accrued in respect of the property up to and including the date fixed for completion:

(c) Provided as follows:—

(i) Rent due on the date fixed for completion shall not be treated as current rent.

(ii) The foregoing provisions of this paragraph shall not (unless otherwise agreed) apply to the premium under any policy of fire insurance.

(iii) All rates shall be apportioned, so far as practicable, according to the period for which they are intended to provide, and not as running from the date when the same are made or allowed.

(4) Where, as respects any rate, the date fixed for completion falls between the expiration of the period for which the last rate was made and the making of a new rate, the new rate shall, for the purposes of this condition, be deemed to have been made at the same rate in the pound as that at which the last rate was made, and shall be calculated from day to day.

As to Completion (*Condition* 5 (1)).

As to the date for completion of the purchase it is to be borne in mind that in relation to contracts for the purchase of interests in land time is not in general of the essence of the contract. The

equitable rule to this effect is preserved by section 41 of the Law of Property Act, 1925, which is as follows :—

"Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

This rule is subject to certain well-settled exceptions.

Thus, time will be deemed to be of the essence of the contract where it can be deduced from the terms of the contract that the parties so intended : *Hipwell* v. *Knight* (1835), 4 L. J. Ex. Eq. 52; 1 Y. & C. Ex. 401. So, time may be of the essence of the contract

(i) by express stipulation (as in the case of the common form condition as to delivery of requisitions within a specified period);

(ii) by reason of the nature of the property (as in the case of the sale of a business as a going concern);

(iii) by reason of surrounding circumstances which go to show that the parties intended that completion should take place within a limited time (*e.g.*, where it is known by the vendor that the purchaser desires immediately on completion to erect a building on the land for the purpose of conducting a trade or business therein.

See, in this connection, *Roberts* v. *Berry* (1853), 22 L. J. Ch. 398; 3 De G. M. & G. 284; 20 L. T. (o.s.) 215.

The position is put thus by Lord Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915), 32 T. L. R. 156 (P. C.): "Equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked, not at the letter, but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time. . . . The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as having really, and in substance, intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard

nothing that lay at its foundation. *Prima facie*, equity treated the importance of such time limits as being subordinate to the main purpose of the parties, and would enjoin specific performance notwithstanding that from the point of view of a Court of law the contract had not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of that general principle of disregarding the letter for the substance which Courts of equity applied when, for instance, they decreed specific performance with compensation for a non-essential deficiency in subject-matter. But equity would not assist where there had been undue delay on the part of one party to the contract, and the other had given him reasonable notice that he must complete within a definite time. Nor would it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, excluded the jurisdiction. Equity would further infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract." His Lordship, however, emphasised that the intention of the parties must appear from what had passed before the contract, and that the construction of the contract could not be affected in the contemplation of equity by what took place after it had been entered into.

In all cases the whole of the terms of the contract and the surrounding circumstances will be considered, and just as the circumstances may modify the apparent terms of the contract, so one term in the contract may modify another.

A contract for the purchase of a dwelling-house required for immediate possession provided that possession should be given to the purchaser on completion and that completion should take place at noon on a certain day, but that if from any cause whatever the purchase was not so completed interest was to be paid by the purchaser at a certain rate on the balance of the purchase price until actual completion. The vendor had not by the date fixed for completion established his title, and negotiations were continued for more than a month thereafter when the purchaser purported to repudiate the contract. It was held that the provision for payment of interest showed that the parties did not contemplate a completion or abandonment of the contract in all events on the date fixed for completion and time was not of the essence of the contract : further that even if time were originally of the essence of the contract the purchaser had waived his right by continuing negotiations after the date fixed for completion, and could not rescind without giving reasonable notice, and thus enabling the

vendor to make good his default before the expiry of the notice : *Webb* v. *Hughes* (1870), 39 L. J. Ch. 606; L. R. 10 Eq. 281.

The recent case of *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K. B. 198, shows, however, that a stipulation for payment of interest will not necessarily prevent time from being of the essence of the contract, if it can be deduced from other provisions in the contract that completion was to take place not later than a certain date. In that case the contract provided that :—

(1) Completion was to take place on August 31, 1933, but the purchaser might complete on August 15, in which case the price was to be reduced by £500.

(2) By giving notice not later than August 15 and paying a 20 per cent. deposit the purchaser might take possession on certain terms as to payment of interest and outgoings.

(3) If the actual completion was delayed beyond August 31, the purchase-money was to be placed on deposit, and this provision was followed immediately by the words, "but the purchase shall in any event actually be completed not later than September 15, 1933", and a statement that interest was to be paid from August 31 until actual completion.

The purchaser did not complete according to the contract, and on November 13, 1933, the vendor's solicitors notified the purchaser that the vendor rescinded the contract, and would re-sell the property. Later the vendor claimed damages for breach of the agreement. The question which arose was whether time was of the essence of the contract, and it was held unanimously by the Court of Appeal that in view of the declaration that the purchase should in any event actually be completed not later than September 15, that date must be regarded as of the essence of the contract although the nominal date, August 31, could not be so regarded.

Whilst the foregoing case is of interest as an illustration it is of no special value. In every case regard must be had to the language employed, but in addition the surrounding circumstances, the nature of the property, and what has passed between the parties, must receive consideration.

Although the contract contains no provision making time of the essence of the contract, and although there may be no special circumstances which operate to make the date for completion of the essence of the contract, the parties may make completion by a certain later date of the essence of the contract by giving a reasonable notice to the other party : *Parkin* v. *Thorold* (1852), 16 Beav. 59. The period of the notice must depend upon the

circumstances, since the word "reasonable" has no meaning except in relation to the particular circumstances of the case. So, when a vendor, following his own delay for a period of two years, gave notice to the purchaser requiring completion within twenty-one days, and intimating that the contract would be at an end if not so completed, it was held that in the circumstances the period was unreasonably short and the notice void : *Green* v. *Sevin* (1879), 49 L. J. Ch. 166; 13 Ch. D. 589.

The Court will consider not only what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of either party and the attitude of the other party in relation thereto : *Stickney* v. *Keeble*, [1915] A. C. 386.

If, however, the vendor has no title at the date of the contract the rule is more strict, and where a purchaser, after the date fixed for completion, required completion within a very short period, he was held to be justified in doing so : *Lee* v. *Soames* (1888), 59 L. T. 366. It was at one time considered that a purchaser was justified in repudiating the contract if it appeared upon the delivery of the abstract of title that the vendor had no title to the interest which he had contracted to sell, but that view was not in accordance with *Coffin* v. *Cooper* (1807), 14 Ves. 205, or the later decision of *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214, the gist of which latter decision is that where the vendor has the means of getting in the estate which he has contracted to sell, the purchaser cannot repudiate the contract upon discovering that the vendor has not a perfect title at the date when the abstract of title is delivered. If on the other hand the vendor has not the interest which he has contracted to sell and has no power to compel third parties to supply him with the title, then the moment the purchaser becomes aware of that fact he is entitled to repudiate the contract, and is under no obligation to give the vendor time to obtain the interest which he has purported to sell : *Re Hucklesby, etc.* (*supra*); *Forrer* v. *Nash* (1865), 35 Beav. 167; *Salisbury* v. *Hatcher* (1842), 12 L. J. Ch. 68; 2 Y. & C. C. C. 54. If, however, the purchaser, upon discovering the vendor's want of title takes no step to repudiate the contract, it will not be competent to him to repudiate after the vendor has got in the estate which he has contracted to sell. In such a case if the vendor, when suing upon the contract, can show that he has in the meantime got in the estate in question, he will be entitled to specific performance : *Thomson* v. *Miles* (1794), 1 Esp. 184; *Hoggart* v. *Scott* (1830), 9 L. J. (o.s.) Ch. 54; *Salisbury* v. *Hatcher* (*supra*).

There is a distinction between want of title, and the existence of incumbrances, in this respect. If the vendor has no absolute power to get in even a nominal reversion of five days the purchaser may be discharged : *Roper* v. *Coombes* (1827), 5 L. J. (o.s.) K. B. 200; 6 B. & C. 534. There may, however, be numerous mortgages or incumbrances which must be discharged before completion, with the result that substantial delay is bound to occur beyond the date fixed for completion. Although no doubt by giving a reasonable notice the purchaser may make time of the essence of the contract, he cannot claim to be discharged from the contract merely on account of the existence of such incumbrances : *Smith* v. *Dolman* (1708), 2 E. R. 1088 (H. L.).

Further a purchaser must be careful that his conduct does not preclude him from repudiating the contract at a later stage if he negotiates with the vendor after discovering the position. Thus, if he allows the time for completion to expire without taking any active step to enforce the contract, but continues correspondence with the vendor, he will lose his right to complain that the contract was not completed on the due date : *Boyes* v. *Liddell* (1842), 6 Jur. 725; *Warde* v. *Jeffery* (1817), 4 Price 294. And this would appear to be the case whether time was or was not originally of the essence of the contract : *Webb* v. *Hughes* (1870), 39 L. J. Ch. 606; L. R. 10 Eq. 281.

It should therefore be noted that any negotiations made by a purchaser after he has discovered that his vendor is not yet in a position to carry out his obligations should be expressed to be without prejudice to the purchaser's rights under the contract.

Where time is originally of the essence of the contract a specific agreed period of extension will not, however, prevent time from being of the essence of the contract so far as concerns the extended period. The " essential character of time " is preserved and applies to the substituted period : *Barclay* v. *Messenger* (1874), 43 L. J. Ch. 449.

As to the Place of Completion (*Condition* 5 (2)).

Generally the contract provides that the completion shall take place at the office of the vendor's solicitor; but where the place for completion is not specified it appears that the vendor may require the purchaser to attend at any place in England or Wales to complete the purchase. This might prove extremely inconvenient and expensive in relation to any small purchase.

In the case of the Law Society's Conditions the completion is to take place if so required at the office of the mortgagee's solicitor. It is suggested that it should be provided that if completion is

required by the vendor at any place other than the town in which the property is situate the purchaser's solicitor's costs of completing at such other place should be borne by the vendor. This would appear to be equitable where the deeds are in some other town owing to the existence of a mortgage or where for any other reason the vendor is unable to arrange for completion within a convenient distance of the property.

Where a London solicitor is acting in relation to a purchase of property in the provinces it is often found, in relation to small purchases particularly, that the vendor's solicitor is willing to arrange for completion in London subject to the payment of his London agent's charges, and this may involve an appreciable saving where the property is at a considerable distance from London.

As to Possession (*Condition* 5 (3) (*a*)).

It is to be noted that on completion the purchaser is to "be let into possession or receipt of the rents and profits". In general, the particulars or special conditions of sale will give full details of any tenancies, or will state that vacant possession will be given. It may, however, occur that there is no mention of any tenancy in the contract. In that case the phrase "possession *or* receipt of the rent and profits" will require interpretation and the position may vary according to the circumstances.

In the first place it should be said that the better opinion appears to be that under an open contract the purchaser is entitled to vacant possession of the property sold. This appears to be properly deducible from the authorities which establish that a contract for sale in the absence of any other evidence is presumed to relate to the whole of the vendor's estate in the land and that in fee simple free from incumbrances: *Hughes* v. *Parker* (1841), 8 M. & W. 244; *Bower* v. *Cooper* (1842), 2 Hare 408; *Doe* v. *Stanion* (1836), 1 M. & W. 695, 5 L. J. Ex. 253; *Bulkeley* v. *Hope* (1858), 1 K. & J. 482; *Sharman* v. *Sharman* (1892), 67 L. T. 833. It may, of course, be shown *aliunde* that the intention of the parties was otherwise and that, for example, the correspondence showed that the sale was subject to tenancies which were disclosed.

Where, however, a vendor who was in occupation of certain land contracted to sell it upon the terms that the purchaser should have "the possession or the receipt of the rent and profits" from a given day, it was decided that the purchaser was entitled to actual possession on that day, and evidence which was tendered to establish a verbal agreement under which it was alleged that the purchaser was in fact to receive interest on his purchase-money by way of rent up to a certain agreed date beyond that fixed for com-

pletion, was not admitted. The Court refused in these circumstances to give effect to the alternative wording, so as to allow the vendor to choose whether to hand over possession or to continue at a rent: *Anker* v. *Franklin* (1880), 43 L. T. 317; 44 J. P. 830. It is, of course, obvious that where any arrangement exists by which the vendor is to remain in possession after completion, the terms of his tenancy thereafter should be most carefully specified in the contract, and in general it will be desirable, if not essential, that a form of lease or tenancy agreement should be settled and agreed contemporaneously with the contract for sale to save any argument as to whether there is a complete bargain between the parties as to the precise terms on which the vendor will remain in possession. Further, in order clearly to establish the position of landlord and tenant between the parties as from the completion, the contract should provide for the exchange of the proposed tenancy agreement or lease concurrently with, and to take effect immediately after, the completion.

We must not, however, be understood to suggest that where the vendor is not in occupation of the property himself, he must give *vacant* possession of the property whenever he agrees to give possession on completion. When a purchaser knows that the property is in the occupation of a tenant and desires to obtain the property for his own occupation upon completion, it is essential that he should stipulate for vacant possession in the contract. So, where a vendor disclosed that the property was in the occupation of a third party and agreed to give possession on completion, it was held that "possession" was given in accordance with the contract by letting the purchaser into possession of the rents and profits receivable from the occupying tenant, and specific performance was decreed on this basis: *Lake* v. *Dean* (1860), 28 Beav. 607.

An agreement to "let the purchaser into receipt of the rents and profits" may be a sufficient reference to the existence of rack rent occupation tenancies, but will not be considered a sufficient disclosure of the existence of ground rent leases or other special leases of this nature. Certain property was described as "now or late in the occupation of" certain persons, and it appeared that part of the property was in fact subject to leases for lives at a very small rent. The Court refused to compel specific performance without suitable compensation: *Hughes* v. *Jones* (1861), 3 De G. F. & J. 307; 31 L. J. Ch. 83. It may be convenient to note here that where a purchaser is given notice of *occupation* tenancies he is deemed to have notice of the rights of the occupying tenants, and should make suitable inquiries in order to ascertain what interests they claim, in order to verify the particulars received from the

vendor. Apart from this aspect of the matter it should be remembered that although options for purchase of the lessor's reversion, or for the renewal of a lease, granted after 1925 require registration as a Land Charge under the Land Charges Act, 1925, many such options granted before the Act may not require registration. In such cases, whatever remedy the purchaser may have against the vendor, the tenant will be entitled as against the purchaser to obtain the freehold or leasehold reversion, or the renewal of his lease as the case may be. See *Daniels* v. *Davidson*, 16 Ves. 249, 17 Ves. 433; *Hunt* v. *Luck*, [1902] 1 Ch. 428 (C. A.), [1901] 1 Ch. 45.

Where the contract provides that vacant possession is to be given on completion and a date is fixed for the completion of the purchase, the purchaser is entitled to claim that the giving of vacant possession on the precise date fixed by the contract is of the essence of the contract. The Court will accept in confirmation of this claim any statements made by the purchaser or his agent when the contract was negotiated : *Nokes* v. *Kilmorey* (1847), 1 De G. & Sm. 44. If, after the date for completion has gone by, the purchaser agrees to a specified period of delay, and does nothing further, he may still claim that time is of the essence of the contract in relation to the substituted date agreed upon. If, however, he does nothing to make it clear that he reserves his rights, or that he is only prepared to wait for a definite further period and thereby induces the vendor to incur substantial expense in the belief and expectation that the purchaser no longer regards time as of the essence of the contract, then the purchaser should not without reasonable notice to the vendor repudiate the contract on the ground that the vendor has failed to comply with his obligations. See *Nokes* v. *Kilmorey* (*supra*), where the Court, though refusing to decree specific performance, awarded no costs to the purchaser in the suit, and also the cases cited above under Condition 5 (1), where the purchaser's notice purporting to repudiate on short notice was held to be completely ineffective, in rather similar circumstances.

As to Outgoings (*Condition* 5 (3) (*b*)).

The position with regard to the apportionment of outgoings on completion under an open contract was stated by Swinfen Eady, J., in *Re Highett and Bird's Contract*, [1902] 2 Ch. 214; 71 L. J. Ch. 508, as follows : " In the absence of any stipulation on the subject the vendor must bear all expenses and outgoings of the property sold down to the time when a good title was first shown, so that the purchaser could safely take possession, and as from that time all such expenses and outgoings must be borne by the purchaser." In *Barsht* v. *Tagg*, [1900] 1 Ch. 231; 69 L. J. Ch. 91, Cozens-

Hardy, J., stated the position similarly : " I think it is settled law that in the absence of any stipulation on the subject, the vendor must bear all expenses and outgoings of property sold down to the time when a good title was first shown so that the purchaser could prudently take possession, and also pay interest on the unpaid purchase-money from that time, and as from that time all such expenses and outgoings must be borne by the purchaser." See also *Carrodus* v. *Sharp* (1855), 20 Beav. 56, to the like effect, and *Dakin* v. *Cope* (1827), 2 Russ. 170.

Upon the sale of a leasehold property subject to a ground rent the term " outgoings " extends to the ground rent which the vendor must bear up to the date fixed for completion : *Lawes* v. *Gibson* (1865), L. R. 1 Eq. 135; 35 L. J. Ch. 148.

Street works charges and expenses arising out of requirements of public authorities are covered by Condition No. 20 of the Law Society's Conditions of Sale and, although strictly " outgoings " payable by the vendor or the purchaser according to the date of the relevant notice, are left for treatment under the Condition last mentioned.

As to rates, Condition 5 (3) (c) (iii) which provides that rates are to be apportioned according to the period for which they are intended to provide and not as running from the date when they are made, appears to be quite equitable since the date on which the rate is made is a purely arbitrary date. Sub-clause (4) of Condition 5 does not, however, appear to be so equitable. Thus, if the contract is entered into in January and completion is to take place on April 30 next, it is fairly certain that completion will fall between the expiration of the period for which the last rate was made and the making of a new rate for the period from April 1 following the date of the contract. Normally the vendor would obtain the benefit in the event of the rate being reduced, or would bear the burden up to the completion date in the event of any increase being made in the rate. The condition in question reverses this process. The writer is unable to see any particular reason for this reversal of the general rule. In such a case the vendor does not bear the due proportion of the outgoings up to the date fixed for completion. He merely pays a sum which is either less or more than the appropriate proportion of the rate actually current at the date fixed for completion. If apportionments were always made on completion or rates were a charge upon the property sold in the hands of a purchaser it might be desirable to adopt such a formula in order that the adjustment made on completion should be final and conclusive, but this is not the case.

(To be continued.)

THE NEW FINANCE ACT.

I.—Transfer of Assets.

II.—Income Settled on Children.

By Leonard Stein, Barrister-at-Law.

From the income taxpayer's point of view the central feature of the Finance Act, 1936, is the attempt made in sections 18—21 to deal with certain devices for the legal avoidance of tax.

Section 18 of the new Act is aimed at transfers of assets abroad. Sections 19 and 20 tighten up the machinery for levying surtax on the undistributed income of privately controlled companies. Section 21 deals with alienation of income in favour of children. Sections 18, 19 and 20 apply for the purposes of assessment to surtax for 1935/36 and have to this extent a retrospective operation. Section 21 has no effect for the purposes of assessment either to standard rate tax or to surtax for any year of assessment earlier than 1936/37.

It is here proposed to deal only with sections 18 and 21, the effect of sections 19 and 20 on the companies surtax legislation being left over for discussion in a later article.

I.—Section 18 : Transfer of Assets.

Purpose of the Section.

The device at which section 18 is aimed is too well known to require any lengthy description. In its simplest form it consists of a transfer of assets, for a consideration payable in debentures, to a foreign company in which all but a nominal proportion of the share capital is held by the transferor. So far as its management is concerned, the company is controlled abroad and conducts all its activities abroad, so as to be for tax purposes not resident in the United Kingdom. The assets transferred either are, or are exchanged into, investments of which the income is not liable to British tax in the hands of a non-resident.

The income of the investments provides cash from which debentures can from time to time be redeemed to the extent required to satisfy the transferor's current requirements. The

sums so received by the transferor do not attract tax in his hands, since they are of the nature of a capital repayment. The company declares no dividends, so that there is no question of any assessment under Case IV or Case V of Schedule D. Surplus income is accumulated by the company and is available for distribution as capital whenever the time may be thought opportune for a winding up. So long as the company is kept in being, the transferor, as debenture-holder, is merely getting back his capital; but tax-free income is, in effect, being accumulated for his benefit as shareholder whenever he chooses to liberate it by means of a winding up.

There are many possible variations of the scheme, but it is not necessary to discuss them in order to be clear as to the principles on which it rests.

Scheme of the Section.

The broad effect of section 18 is that a notional income is for tax purposes to be attributed to an individual where the following conditions are satisfied :—

(1) The individual sought to be charged must be ordinarily resident in the United Kingdom.

(2) He must have " power to enjoy " income of a person (whether a corporate person or an individual) resident or domiciled out of the United Kingdom.

It is expressly provided in section 35 of the Act that the expression " the United Kingdom " does not include the Isle of Man.

The expression " power to enjoy " is a technical expression having the wide meaning assigned to it by sub-section 3 (see below).

(3) The individual must have " power to enjoy " the income " by virtue of " rights.

(4) He must have acquired those rights " by means of " a transfer of assets in conjunction with " associated operations ".

The expression " associated operations " is to be given the wide meaning assigned to it by sub-section 2 (see below).

(5) The transfer of assets must have been of such a nature that " by virtue or in consequence of " that transfer, or of that transfer in conjunction with " associated operations ", income has become payable to a person resident or domiciled out of the United Kingdom.

It is immaterial whether the transfer and " associated

operations" were effected before or after the commencement of the Act (sub-section 7—see below).

Where all these conditions are satisfied, the income which the individual has "power to enjoy" is for tax purposes to be deemed to be his income, unless he can show that the transfer and any "associated operations" "were effected mainly for some purpose other than the purpose of avoiding liability to taxation"—not merely liability to income tax.

So far as tax at the standard rate is concerned, a section 18 assessment will be under Case VI of Schedule D, but no assessment to tax at the standard rate will be made under section 18 in respect of income which has already borne tax at the standard rate by deduction or otherwise (Second Schedule, Rule 1). Circumstances can be imagined in which a question might arise as to the year of assessment for which particular items of notional income are to be deemed to form part of the total income of an individual chargeable under section 18.

So far as the year of assessment 1935/36 is concerned, the effect of the proviso to section 18 (7) is that that section will in respect of that year apply only for the purposes of assessment to surtax and will not apply for the purposes of assessment to standard rate tax.

OBSERVATIONS ON SECTION 18 (*a*).

Introductory Paragraph.

"18. For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows :— "

It is not clear whether the individual must not only be ordinarily resident in the year of assessment, but must also have been ordinarily resident at the time of the transfer. The operative words of sub-section 1 of section 18 (see below) do not appear to exclude transfers effected at a time when the individual was not ordinarily resident. But it may be that these words are to be cut down by reference to the purpose of the section as explained in the introductory paragraph. The purpose is expressed to be

(*a*) These observations do not of course, purport to be an exhaustive commentary.

that " of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets ", etc. The transfers aimed at seem clearly to be transfers by individuals ordinarily resident in the United Kingdom; and " so far as the intention of an enactment may be gathered from its own terms, it is permissible to have regard to that intention in interpreting it " (*per* Lord Macmillan in *Perry* v. *Astor* (1935), 19 T. C. 255, at p. 288).

The Act contains no definition of " transfer of assets ". The expression occurs in the Income Tax Acts in section 33 (4) and section 35 of the Finance Act, 1927, but neither in that nor in any other context does it appear to have been judicially construed. It seems, *prima facie*, to connote alienation. The question whether a loan is a transfer of assets may in some circumstances be of practical importance in dealing with the section.

The transfer of assets must be a transfer " by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled abroad ". The words " becomes payable " seem to be appropriate only to income of the nature of interest, dividends, annual payments and the like, as distinct from trading profits, *e.g.*, profits arising from trading in investments.

Sub-section 1.

" (1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts : "

The individual must, " by means of " a transfer of assets, have acquired rights by virtue of which he has power to enjoy the income of a person resident or domiciled abroad. A question may arise as to whether the transfer must be a transfer affected by the individual sought to be charged, or whether an individual may be chargeable by reference to a transfer made by some other person. Let it be supposed, for example, that X has carried out a tax avoidance scheme on the usual lines by transferring assets

to a foreign company. Let it be further supposed that he has settled shares in the company on certain trusts for the benefit of Y, or alternatively, that he has died possessed of the shares, which have passed to Y under his will. Let it be taken for granted that Y has "power to enjoy" and has that power by virtue of rights. Does it follow that Y will be chargeable under section 18? The case is not clear beyond dispute, but the weight of argument appears to be in favour of the view that Y will not be chargeable.

The individuals made chargeable by sub-section 1 are individuals who have "by means of"—not merely "as a result of"—certain transactions acquired certain rights. Again, the introductory paragraph explains that the purpose of the section is to prevent the "avoiding"—not merely "the escaping"—of liability to tax by certain means. In neither case does the language seem appropriate in relation to an individual who has played a purely passive part as the object of another person's bounty. Moreover, if such an individual were chargeable under section 18, highly anomalous consequences might follow. Let it be supposed that X, having transferred assets to a foreign company for tax avoidance purposes, settles shares in the company for the ultimate benefit of Y, reserving to himself a power of revocation. Y receives no income from the shares, but if section 18 applied, he would be deemed to have power to enjoy income of the foreign company. Thus, a settlement made quite independently of Y by another person might, without providing him with any income, involve him in a heavy liability to tax and in the end be revoked without ever bringing him any benefit at all. Further, since X has reserved a power of revocation, it follows that, if section 18 applied to Y, the same income would be notional income both of X and Y —of X under sub-section 3 (d) because of his power of revocation, and of Y because, so long as that power is unexercised, its existence will not (it would seem) prevent him from being caught by other paragraphs of the same sub-section.

The view taken on this point by the Revenue authorities may be inferred from the explanation given in the House of Commons by the Financial Secretary to the Treasury, who, in reply to a question as to the position of an heir or a legatee, said that "the person who is liable under this clause is *the person who makes the transfer*" (*b*).

In *Perry* v. *Astor*, above, the House of Lords decided that the words "any income" at the commencement of section 20 (1) of the Finance Act, 1922, must be construed as meaning "any

(*b*) Official Report, June 15, 1936, column 691.

income chargeable with tax under the British Finance Act of that year" (see *per* Lord Macmillan, at p. 290). In sub-section 1 of section 18 of the 1936 Act the Legislature had been at pains to make it clear that the words "any income" are there to be construed without any such limitation. It will, for example, make no difference that the income is income arising from sources outside the United Kingdom to American trustees. If it is income which would be chargeable to British tax if received in the United Kingdom by an individual ordinarily resident in the United Kingdom, it will be within the scope of section 18, even though it would, but for section 18 itself, be outside the ambit of British taxation.

Sub-section 1, *proviso.*

"Provided that this subsection shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation."

Notwithstanding that all the requirements of sub-section 1 can be shown to be satisfied, the individual will be immune from tax under section 18 if, but only if, he can show affirmatively that both the transfer and any "associated operations" were effected mainly for some purpose other than that of avoiding liability to taxation. It will be observed that the word used is the comprehensive word "taxation" (presumably meaning British taxation), though the purpose of the section has been expressed to be that of "preventing the avoiding . . . of liability to *income tax*".

Sub-section 2.

"(2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

It will be observed that an "associated operation" may be an operation "of any kind", and that it is immaterial whether it was effected by the individual who made the original transfer or by some other person. The position seems to be that once a particular transfer has been taken as the starting-point, all that is essential is that the assets in relation to which the operations

were effected should have been the assets originally transferred or assets in the line of descent from the assets originally transferred or their income. It is expressly provided that where assets have been transferred to a company, shares or obligations of that company may be treated as assets representing those assets (see sub-section 5 (e)).

Sub-section 3.

"(3) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if—

(a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual; or

(b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or

(c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or

(d) the individual has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income; or

(e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income."

In a case in which assets have been transferred to a foreign company for tax avoidance purposes, it is not clear that it will be impossible to extricate the transferor from the operation of section 18 where he retains an interest only as a debenture-holder, the shares in the foreign company having been vested in trustees on irrevocable trusts for the benefit of some person or persons other than the transferor. Where, on the other hand, the transferor has retained an interest as a shareholder, it will be difficult to devise means by which he can achieve his purpose without having "power to enjoy".

But " power to enjoy " is not enough of itself to bring the case within section 18. Sweeping as is the language of sub-section 3, and especially of paragraph (e), that paragraph, like all the rest, is to be read in relation to the words in sub-section 1 : " has . . . acquired any rights by virtue of which he has power to enjoy . . ." It is not enough that the provisions of one or other of the paragraphs of sub-section 3 can be shown to be satisfied. If so, the individual has " power to enjoy ". But section 18 will apply only if it can further be shown :—

(a) That he has that power " by virtue of " rights;

(b) That he has acquired those rights " by means of " a transfer of assets, or of a transfer plus " associated operations ";

(c) That " by virtue or in consequence of " that transfer, or of that transfer plus " associated operations ", income has become payable to a person resident or domiciled abroad.

The proviso to sub-section 1 speaks of " *the* transfer and any associated operations ". It seems clear that some particular transfer must be fastened upon as the starting-point. It also seems clear that once a particular transfer has been selected, the only " associated operations " which can be looked at are, by reason of the definition in sub-section 2, operations relating to the assets transferred or their income or to assets in the line of descent from those assets or their income. In considering whether the " power to enjoy " is vested in the individual by virtue of rights acquired in the prescribed manner, it is not (it would seem) permissible to point to the combined effect of two or more transfers of assets and their respective " associated operations ".

Sub-section 4.

" (4) In determining whether an individual has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to the individual as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits."

Sub-section 3 having set forth the tests by which it is to be determined whether an individual has " power to enjoy " the income of a person resident or domiciled abroad, sub-section 4 provides that in determining whether there is " power to enjoy " within the meaning of the section, " regard is to be had to the

substantial result and effect of the transfer and any associated operations ". This has been explained by the Attorney-General (*c*) as meaning that the Commissioners are " not to be tied by the letter to some legal form which is being used for a purpose for which it was not originally intended, but that they would be entitled to look at the substantial result of the transaction ". The inference seems to be that, even though the transaction was a real transaction and not a sham, the Commissioners are to look beyond its legal effect and to consider something different, *viz.* its " substantial result ". It may be pertinent to recall Lord Tomlin's observation in *C. I. R.* v. *The Duke of Westminster*: " The substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles " (*d*).

It is to be observed that, whatever may be the real effect of sub-section 4, it appears to apply only to the determination of the question whether there is " power to enjoy " within the meaning of section 18. It has (it would seem) no application to the determination of the question whether the individual has that power by virtue of rights, and of rights acquired by the means described in sub-section 1.

Sub-sections 5, 6 and 7.

" (5) For the purposes of this section—

(a) a reference to an individual shall be deemed to include the wife or husband of the individual;

(b) the expression " assets " includes property or rights of any kind, and the expression " transfer ", in relation to rights includes the creation of those rights;

(c) the expression " benefit " includes a payment of any kind;

(d) references to income of a person resident or domiciled out of the United Kingdom shall, where the amount of the income of a company for any year or period has been apportioned under section twenty-one of the Finance Act, 1922, include references to so much of the income of the company for that year or period as is equal to the amount so apportioned to that person;

(e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that

(*c*) House of Commons, Official Report, June 15, 1936, column 722.
(*d*) (1935), 19 T. C. 490, at p. 521.

income or those accumulations are or have been transferred.

" (6) The provisions of the Second Schedule to this Act shall have effect for the purpose of carrying this section into effect and otherwise for supplementing the provisions of this section, and this section is referred to in that Schedule as " the principal section ".

" (7) The provisions of this section shall apply for the purposes of assessment to income tax for the year 1935-36 and subsequent years, and shall apply in relation to transfers of assets and associated operations whether carried out before or after the commencement of this Act :

" Provided that, for the year 1935-36, no income shall be charged to tax at the standard rate by virtue of the provisions of this section, but surtax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged."

There is nothing to show that paragraph (a) of sub-section 5 applies only to cases in which the spouses are living together. If then, a married couple, A and B, are living apart under a deed of separation and A effects transactions of the nature aimed at by section 18, the notional income may (it would seem) be deemed to be the income of B. Let it be supposed that A is not ordinarily resident in the United Kingdom, so that, but for sub-section 5 (d), section 18 would have no application. The effect of sub-section 5 (a) seems to be that if B is ordinarily resident in the United Kingdom, the fact that A is not will make no difference. The transactions have been effected by the husband or wife of an individual ordinarily resident in the United Kingdom, and, by reason of sub-section 5 (a), the words " such an individual " in sub-section 1 must (it would seem) be taken to mean " such an individual or the husband or wife of such an individual ".

The effect of sub-section 5 (d) may be illustrated as follows. X, an individual ordinarily resident in the United Kingdom, controls a foreign company, A. A, in turn, controls an English company, B. B does not distribute its income, which consequently becomes liable to apportionment under the companies' surtax legislation. But the income apportioned to A as a member of B cannot be apportioned in turn among the members of A; section 32 of the 1927 Act does not apply, since A is a foreign company. The apportionment is, therefore, ineffectual. The effect of sub-section 5 (d) of the 1936 Act is that the undistributed income of B, in so far as apportioned to A, may be deemed to be income of X as being income of A which X has power to enjoy.

II.—SECTION 21 : INCOME SETTLED ON CHILDREN.

Purpose and Scheme of the Section.

The purpose of section 21 is to prevent avoidance of tax by means of alienation of income in favour of children—a device too well known to require description.

As already pointed out, section 21 has no retrospective effect and is inapplicable for the purposes of assessment either to standard rate tax or to surtax for any year of assessment earlier than 1936/37.

In considering the effect of section 21, it is essential to bear in mind that for the purposes of that section a settlement which is irrevocable in the ordinary meaning of the term will be deemed, nevertheless, not to be irrevocable if it presents any of the characteristics described in sub-section 8. The sub-section is reproduced and commented upon below. Here it need only be said that the word "irrevocable" is to be understood in an artificial and restricted sense.

This having been made clear, the effect of section 21 may be summarised as follows :—

(1) The first class of settlements to be considered is that consisting of settlements which were made before April 22, 1936, and were "irrevocable" immediately before that date. These settlements are wholly outside the scope of section 21, irrespective of whether there has been a settlement of capital or merely a covenant to make periodical payments. In the case of settlements of this type, the relevant provisions will continue to be those of paragraph (c) of section 20 (1) of the Finance Act, 1922, and the ancillary provisions of that sub-section. The primary test will be, as heretofore, whether the effect of the settlement is to make income payable to or for the benefit of a child of the settlor for a period less than the life of the child or the joint lives of the settlor and the child. If so, that income will, so long as the child is an infant and unmarried, be deemed to be income of the settlor.

(2) On the other hand, where the settlement, whenever made, is not "irrevocable", the tests to be applied will in future be entirely different. In the case of all such settlements, whether there has been a settlement of capital or not, the effect of section 21 is that for tax purposes (though not, of course, for any other purpose) the settlor's income for any year of assessment will be deemed to include :

(a) any income which in the course of that year has by virtue or in consequence of the settlement been paid to or for the benefit of a child of the settlor, and

(b) any income which is for the purposes of section 21 to be deemed to have been so paid,

if at the commencement of that year the child was an infant and unmarried.

The nature of the income to be deemed to have been paid to or for the benefit of a child is described in sub-section 2, which is reproduced and commented upon below. The effect of that sub-section is, broadly speaking, that where income is accumulated, the question will be whether that income, or assets representing it, will or may become payable at some time in the future to or for the benefit of a child of the settlor. If so, notwithstanding that the child has only a contingent interest, and irrespective of the nature of the contingency, the income will for the purposes of section 21 (though not for any other purpose) be deemed to have been paid to or for the benefit of the child. It will be deemed to have been so paid in the year of assessment in which it was dealt with by way of accumulation, and if at the commencement of that year the child was an infant and unmarried, the income will be deemed to be income of the settlor.

Where income is dealt with by way of accumulation, two or more children of the settlor may be found to have contingent interests in the same income. Such income will for the purposes of section 21 be deemed to be equally divided between those children, and so much of it only will be deemed to be income of the settlor as remains after deducting the notional share of any child who at the commencement of the relative year of assessment was of age or married.

(3) It remains to consider the provisions of section 21 as they relate to settlements which are irrevocable within the meaning of the section but were either not made before April 22, 1936, or were not "irrevocable" immediately before that date.

In the case of settlements of this category, a distinction is drawn between income consisting of periodical payments out of the income of the settlor and income arising from a settled fund.

So far as income of the first type is concerned, the fact that the settlement is within the meaning of section 21 an irrevocable settlement will make no difference; the section will in relation to such income be applicable to its full extent in the manner described above, whether the income is dealt with by way of actual payment to or for the benefit of a child of the settlor or by way of accumulation.

On the other hand, income arising from a settled fund will not be caught by section 21 in so far as it is dealt with by way of accumulation, if at the time when it was so dealt with the settle-

ment was "irrevocable". But safeguards are provided against attempts to defeat the section by accumulating income and drawing upon capital (including accumulated income) for actual payments to or for the benefit of the child. Such payments will be deemed to be payments of income, and as such within the reach of section 21, unless the contrary is established in the prescribed manner (see sub-section 3 (b), below).

In No. 243 of *The Conveyancer* (February, 1936) there will be found among the Miscellaneous Precedents (pp. 363—366) a Deed of Covenant in favour of infant children designed to avoid the operation of section 20 of the Finance Act, 1922. It will be seen from what has been said above that by reason of the provisions of section 21 of the 1936 Act this precedent will no longer serve its purpose. Notwithstanding that the periodical payments are covenanted to be made during the joint lives of the settlor and child, the effect of the new provisions is that the income arising under such a Deed will be deemed none the less to be income of the settlor. This would be so even in the case of a Deed executed in this form before April 22, 1936, since the Deed is not irrevocable.

OBSERVATIONS ON SECTION 21 (*e*).

Sub-section 1.

"21.—(1) Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

The period for which the income is payable to or for the benefit of the child is immaterial. Save for the purpose of determining under proviso (iii) to sub-section 8 whether a settlement directing income to be held on protective trusts is an "irrevocable" settlement, it no longer makes any difference whether the period is or is not less than the life of the child or the joint lives of the child and the settlor. It is enough that by virtue or in consequence of the settlement income has in any year of assessment been paid to or for the benefit of a child of the settlor, provided

(*e*) These observations do not, of course, purport to be an exhaustive commentary.

only that at the commencement of that year the child was an infant and unmarried.

It will be observed that the test is whether the child was an infant and unmarried at the *commencement* of the year of assessment. Let it be supposed that A has covenanted to make payments at three-monthly intervals for the benefit of his daughter B, who on April 6 in a certain year of assessment was under age and unmarried. B marries on April 7. The whole of A's payments in that year of assessment will be deemed, nevertheless, to be income of A and not to be income of B or her husband. As a counterpoise to this, it may be pointed out that where a settlement is made in favour of a child during the year of assessment in which the child was born, section 21 will have no application in respect of that year of assessment unless the child happens to have been born on April 6 in that year. But where the settlement is made in favour of an infant child in any year of assessment other than that in which it was born, the income of the first year of assessment will be caught by section 21, while, on the other hand, section 21 will also catch the whole income of the year of assessment in which the child comes of age or marries, unless it happens to come of age or to marry on April 6 in that year.

The words "and not as the income of any other person" (which do not appear in the corresponding provisions of section 18 (1)) seem to have been inserted only in order to make it clear beyond any possibility of doubt that the income is not only to be included in the income of the settlor but is to be excluded from that of the child, *e.g.* in the computation of the child's income for the purposes of the settlor's claim to child allowance.

Sub-section 2.

"(2) Subject as hereafter provided, for the purpose of this section—

(a) income which, by virtue or in consequence of a settlement to which this section applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future (whether on the fulfilment of a condition, or the happening of a contingency, or as the result of the exercise of a power or discretion conferred on any person, or otherwise) shall be deemed to be paid to or for the benefit of that child; and

(b) any income dealt with as aforesaid which is not required by the settlement to be allocated, at the time when it is so dealt with, to any particular child or children of the

> settlor shall be deemed to be paid in equal shares to or for the benefit of each of the children to or for the benefit of whom or any of whom the income or assets representing it will or may become payable or applicable."

It is only for the purposes of section 21 that income dealt with in the manner described in sub-section 2 (a) will be deemed to be paid to or for the benefit of the child. If the child was not an infant and unmarried at the commencement of the relative year of assessment, section 21 will have no application, and the income will not by reason of sub-section 2 (a) be deemed to have been paid to or for the benefit of the child so as to form part of the total income *of the child.*

The question to be answered under sub-section 2 (a) does not appear to be merely whether by virtue or in consequence of the settlement the income (or assets representing it) will or may become payable in the future to or for the benefit of the child. The test is whether by virtue or in consequence of the settlement the income is "dealt with" in such a manner that that income (or assets representing it) will or may become so payable. The distinction may be material in considering the application of section 21 in a case in which the child is merely one of the objects of a discretionary trust of income, the whole of the income being required to be distributed, as opposed to a case in which the child has a contingent interest in income subject to a trust for accumulation.

Where the child has an interest of any kind in income directed to be accumulated, the nature and degree of his interest will be immaterial. Let it be supposed, for example, that A, the settlor, has two children—B, who is an infant and unmarried, and C who is married and has children. A has covenanted with trustees to make periodical payments to be accumulated for the benefit of such one or more of A's children and grandchildren as A shall by deed revocable or irrevocable appoint. A has appointed to one of his grandchildren, D, but he has reserved power to revoke the appointment. The income will (it would seem) be caught by section 21, for A *may* revoke the appointment and *may* appoint the income to B, so that the income (or assets representing it) *may* become payable to B.

Inasmuch, however, as A, having revoked the appointment in favour of D, could make an appointment in favour of his married child, C, as well as in favour of his infant and unmarried child, B, sub-section 2 (b) will apply, with the result that only one-half of the income will be deemed to be income of A.

If, however, C were dead and the only child of A to whom the income might become payable in the future were A's infant and unmarried child, B, the whole of the income would be deemed to be income of A. Sub-section 2 (b) provides for a notional allocation of income only as between children of the settlor. If there is only one child of the settlor having a contingent interest and that child is an infant and unmarried, the whole of the income will be deemed to be income of the settlor, no matter how many other persons may be interested in that income in the same degree as the child or even in a superior degree.

Sub-section 3.

"(3) Where any income is dealt with as mentioned in the last foregoing subsection by virtue or in consequence of a settlement to which this section applies, being a settlement which, at the time when the income is so dealt with, is an irrevocable settlement—

(a) the provisions of the last foregoing subsection shall not apply to that income unless and except to the extent that that income consists of, or represents directly or indirectly, sums paid by the settlor which are allowable as deductions in computing his total income for the purpose of the Income Tax Acts; and

(b) any sum whatsoever paid thereafter by virtue or in consequence of the settlement, or any enactment relating thereto, to or for the benefit of a child of the settlor, being a child who at the commencement of the year of assessment in which the sum is paid is an infant and unmarried, shall be deemed for the purposes of subsection (1) of this section to be paid as income, unless and except to the extent that the sum so paid together with any other sums previously so paid (whether to that child or to any other child who, at the commencement of the year of assessment in which that other sum was so paid, was an infant and unmarried) exceeds the aggregate amount of the income which by virtue or in consequence of the settlement has been paid to or for the benefit of a child of the settlor, or dealt with as mentioned in subsection (2) of this section, since the date when the settlement took effect or the date when it became irrevocable, whichever is the later."

"*Or any other enactment relating thereto*"—*e.g.*, section 31 of the Trustee Act, 1925.

If the settlement was made before April 22, 1936, and was

"irrevocable" immediately before that date, section 21 does not apply (see sub-section 10). Sub-section 3 is concerned with "irrevocable" settlements not within this category. In the case of such settlements, income dealt with by way of accumulation will not be deemed to be income of the settlor if it is income arising from a settled fund.

Let it be supposed, then, that income arising from a settled fund has been accumulated under an "irrevocable" settlement and has thus, by virtue of paragraph (a), escaped the operation of section 21, notwithstanding that it was income in which an infant and unmarried child of the settlor had an interest. So long as no actual payment is made by the trustees, under their express or statutory powers, to or for the benefit of the child, the settlor will be under no liability. But the effect of paragraph (b) is that if and when any such payment is made, the amount of that payment will be deemed to be income of the settlor unless the prescribed computation can be shown to work out in his favour.

The two factors in the computation are :

(1) The aggregate amount of the income of the settled fund from the prescribed date (see below) to the date of the payment in question, in so far as that income was either actually paid to or for the benefit of a child (not necessarily an infant and unmarried child) of the settlor or was accumulated to form part of a fund in which a child of the settlor had an interest.

The prescribed date means the date on which the settlement took effect or the date (if later) on which it became irrevocable.

(2) The amount of the payment in question plus the aggregate amount of any actual payments previously made to or for the benefit of any child of the settlor who was an infant and unmarried at the commencement of the relative year of assessment.

The effect of paragraph (b) is that the amount of the payment will be deemed to be income of the settlor only to the extent of the amount (if any) by which (2) exceeds (1).

The principle is that the payment is to be treated as a payment of income to the extent to which income (including accumulated income) is found still to be available to be drawn upon. It will be observed that in arriving at the amount of the available income (including accumulations), the deductions to be made in respect of actual payments out of the income are limited to payments to or for the benefit of children who, at the commencement of the relative years of assessment, were infants and unmarried; on the other hand the basic figure from which the deductions are to be made is (it would seem) a figure representing the whole income of the settled fund in so far as it has either been actually paid to or

for the benefit of some child of the settlor or has been accumulated to form part of a fund in which, at the time when it was so dealt with, some child of the settlor had an interest, irrespective of whether that child was or was not an infant and unmarried at the commencement of the year of assessment in which the payment was made or the income dealt with by way of accumulation.

Sub-section 4.

" (4) Income paid to or for the benefit of a child of a settlor shall not be treated as provided in subsection (1) of this section for any year of assessment in which the aggregate amount of the income paid to or for the benefit of that child, which, but for this subsection, would be so treated by virtue of the foregoing provisions of this section, does not exceed five pounds."

Sub-section 5.

" (5) Subsections (2) and (3) of section twenty of the Finance Act, 1922, shall have effect as if references to paragraph (c) of subsection (1) of that section included references to the foregoing provisions of this section, as if references to a disposition included references to a settlement, and as if the reference to the making of a disposition included a reference to the making of or entering into a settlement, and subsection (4) of that section shall have effect as if the reference to that section included a reference to the said provisions of this section."

The obscurity of this sub-section was the subject of unfavourable comment in the House of Commons when the Finance Bill was discussed in Committee. But the sub-section does not seem to be quite as black as it has been painted. The provisions of sub-sections 2, 3 and 4 of section 20 of the 1922 Act are not obscure, and all that has been done is to extend their application to cases arising under section 21 of the 1936 Act. A settlor who has paid tax to which he has become chargeable by reason of section 21 will be entitled, if he so elects, to be recouped by the trustee. Conversely, where the operation of section 21 has enabled him to obtain a repayment of tax, he may be required to account to the trustee for the amount of such repayment. Finally, for the purpose of computing the amount of the surtax which has become payable by the settlor in respect of the notional income, that notional income is to be deemed to be the highest part of his income.

If the settlor happens to be a person to whom income of a privately controlled company has been apportioned under section 21

of the Finance Act, 1922 (as amended by the Acts of 1927 and 1936) the income so apportioned to him is likewise to be deemed to be the highest part of his income (see Finance Act, 1922, First Schedule, paragraph 8). The Income Tax Acts provide no means of dealing with the anomalous situation which may thus arise (see Report of the Income Tax Codification Committee, pp. 300—301).

Sub-section 6.

" (6) No repayment shall be made under section twenty-five of the Income Tax Act, 1918, on account of tax paid in respect of any income which by virtue of this section has been treated as the income of a settlor."

The effect of section 25 of the Income Tax Act, 1918, is, briefly, to provide for the repayment of tax on the happening of the contingency in cases in which income has been accumulated for the benefit of an individual contingently on his attaining a specified age or marrying. The beneficiary is, in effect, entitled to have the income treated *ex post facto* as having been his income as it arose, and to claim any repayment of tax to which he can be shown to be entitled on this footing. He will not, however, be entitled to any repayment in respect of income which, though in fact accumulated for his benefit, is by virtue of section 21 of the 1936 Act to be deemed to have been income of the settlor.

Sub-section 7.

" (7) The General or Special Commissioners may by notice in writing require any party to a settlement to furnish them within such time as they may direct (not being less than twenty-eight days), with such particulars as they think necessary for the purpose of this section, and if that person without reasonable excuse fails to comply with the notice, he shall be liable to a penalty not exceeding fifty pounds, and, after judgment has been given for that penalty, to a further penalty of the like amount for every day during which the failure continues."

The inquisitorial possibilities opened up by this sub-section are limited by the words " without reasonable excuse ".

Sub-section 8.

" (8) For the purposes of this section, a settlement shall not be deemed to be irrevocable, if the terms thereof provide—

(a) for the payment to the settlor or, during the life of the

settlor, to the wife or husband of the settlor for his or her benefit, or for the application for the benefit of the settlor or, during the life of the settlor, of the wife or husband of the settlor, of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement; or

(b) for the determination of the settlement by the act or on the default of any person; or

(c) for the payment of any penalty by the settlor in the event of his failing to comply with the provisions of the settlement:

"Provided that a settlement shall not be deemed to be revocable by reason only—

(i) that it contains a provision whereunder any income or assets will or may become payable to or applicable for the benefit of the settlor, or the wife or husband of the settlor, on the bankruptcy of any such child as is mentioned in paragraph (a) of this subsection or in the event of an assignment of or charge on that income or those assets being executed by such a child; or

(ii) that it provides for the determination of the settlement as aforesaid in such a manner that the determination will not, during the lifetime of any such child as aforesaid, benefit any person other than such a child, or the wife, husband, or issue of such a child; or

(iii) in the case of a settlement to which section thirty-three of the Trustee Act, 1925, applies, that it directs income to be held for the benefit of such a child as aforesaid on protective trusts, unless the trust period is a period less than the life of the child or the settlement specifies some event on the happening of which the child would, if the income were payable during the trust period to him absolutely during that period, be deprived of the right to receive the income or part thereof."

Full weight must be given to the words "if the terms thereof provide".

Under paragraph (a) it will apparently make no difference that the fund out of which (or the income of which) a payment may be made to the settlor, or to the settlor's wife or husband, is entirely distinct from the fund in which the child has an interest.

The mere fact that the two funds happen to be subject to trusts declared by the same settlement will (it would seem) be enough to cause the settlement to be treated as not irrevocable.

The life to be considered is the life of "any child of the settlor" who is or may be a beneficiary under the settlement. It would apparently make no difference that the settlor, or the settlor's husband or wife, was incapable of benefiting so long as there was any child of the settlor who, being a beneficiary or potential beneficiary, was an infant and unmarried.

The sweeping language of paragraph (a) is, however, cut down by provisos (i) and (iii).

The effect of paragraph (b) is cut down by proviso (ii). A settlement for the benefit of a daughter, if irrevocable in the ordinary sense of the term, will not (for example) be deemed not to be irrevocable merely because it provides that on her marriage the trust fund may be paid over by the trustees to the trustees of a marriage settlement in the usual form.

The application of the last part of paragraph (c) is obscure. In the debate in Committee in the House of Commons (*f*), an intelligible explanation of this paragraph was asked for but was not forthcoming.

Sub-section 9.

"(9) In this section—

(a) the expression "child" includes a stepchild, an adopted child and an illegitimate child;

(b) the expression "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets;

(c) the expression "settlor", in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement;

(d) the expression "income", except in the third and fourth places where it occurs in subsection (1) of this section, includes any income chargeable to income tax by deduction or otherwise and any income which would

(*f*) Official Report, June 15, 1936, columns 773 ff.

have been so chargeable if it had been received in the United Kingdom by a person resident and ordinarily resident in the United Kingdom, but does not include income arising under a settlement in a year of assessment for which the settlor is not chargeable to income tax as a resident in the United Kingdom."

It will be seen from paragraph (b) that the word "settlement" is to be widely construed and does not refer only to settlements in the ordinary sense of the term.

Devices for defeating the section by means of indirect settlements are guarded against by paragraph (c). In connection with the last part of that paragraph reference may be made to the reciprocal arrangement in *C. I. R.* v. *Clarkson Webb* (*g*).

The effect of the first part of paragraph (d) is not to exclude any income from the scope of section 21, but merely to dispose of any difficulty which might arise from the decision in *Perry* v. *Astor* (*h*) as to the limitation to be placed on the words "any income" at the opening of section 20 of the Finance Act, 1922—see note above on section 18 (1). On the other hand, the last part of paragraph (d) does restrict the operation of section 21 by excluding income arising in a year of assessment in which the settlor is not chargeable to tax as a resident in the United Kingdom.

Sub-section 10.

"(10) This section applies to every settlement, wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before the twenty-second day of April, nineteen hundred and thirty-six, which immediately before that date was irrevocable."

There may be room for doubt as to whether "irrevocable" means simply "irrevocable" or whether that word is to be construed by reference to the provisions of sub-section 8 as to settlements which, even though irrevocable, are to be deemed not to be irrevocable. Under sub-section 10 the question is whether a settlement was irrevocable at a point of time in the past, *viz.* immediately before April 22, 1936. Sub-section 8 provides that certain types of settlement shall be deemed not to be irrevocable, but it does not seem necessarily to follow that such settlements are to be deemed not to have been irrevocable in the past.

(*g*) (1932), 17 T. C. 457.
(*h*) (1935), 19 T. C. 255.

Moreover, sub-section 10 makes section 21 inapplicable to settlements within the terms of the exception, and if a settlement was in fact irrevocable immediately before April 22, 1936, it is not clear that sub-section 8 of section 21 can, nevertheless, apply to such a settlement so as to require it to be treated as a settlement which was not irrevocable on that date.

Sub-section 11.

"(11) Paragraph (c) of subsection (1) of section twenty of the Finance Act, 1922, and any other provisions of that subsection relating to that paragraph, shall cease to have effect as respects any settlement to which this section applies."

The effect of this sub-section has already been commented upon.

A MOVEABLE FEE SIMPLE. LOT MEADOWS.

By F. E. Farrer.

To the practitioner wearied with the welter of modern legislation, relief comes sometimes in shape of a rare real property right turning up for his consideration.

For many years past the writer has wished to come across in practice, the case of first the fee in the soil of Blackacre being in A for one part of a year, and in B for the rest of that year. Secondly of a meadow held in strips, owned in this way, each proprietor in the meadow holding so much acreage therein in fee, the actual locus of his particular quantum of acreage varying from year to year according to allotment. The first case, which may be a great deal commoner than is generally suspected, has not come before the writer, though there can be no doubt of its legal possibility, on which he may later submit an article.

The second case has recently come before the writer in practice, in the case of " Yarnton " Lot Meadow in the parish of Yarnton in the county of Oxford.

This meadow lies on the north bank of the river Thames or Isis, and is divided into two portions, the western known as " West Mead ", the eastern as " Oxhey ", " Oxhay ", or " Oxey ", and rarely " Oxhurst ". The two portions adjoin and lie open to each other for a short space between the river and hedge, there being no physical boundary between them at this point, the line of division between them being a slight depression in the ground locally well known.

Across the river on the southern side thereof and opposite to " Oxhey " is still another Lot Meadow known as " Pixey ", now within the boundaries of the City of Oxford. Many of the holders of moveable lots in Yarnton Meadow also hold moveable lots in Pixey; but the drawing for strips in Pixey is not governed by the drawing of the thirteen balls which governs the yearly allocation of the strips in Yarnton.

In each portion—West Mead and Oxhey—of Yarnton Mead there is a portion called " Tydalls ", not physically fenced off, the ownership of which remains constant and abiding, being never drawn for.

"Tydalls" in Oxhey contains about 6 statute acres, the western portion of which, about 4 acres, formerly belonged to Exeter College, the eastern portion of which belongs to Begbroke Rectory; "Tydalls" in West Mead contains about 3 statute acres.

The residue of Oxhey and West Mead is notionally but not by physical boundaries divided—there being three divisions in Oxhey and five divisions in West Mead; and each division is again divided into thirteen strips not physically bounded off, each strip being ascertained by direction posts. There are consequently thirty-nine strips equal in area to each other in Oxhey, and sixty-five strips equal in area to each other in West Mead; the area of Oxhey exclusive of "Tydalls" therein is locally reckoned to contain 65 customary acres, and the area of West Mead exclusive of "Tydalls" therein is locally reckoned to contain 78 customary acres. The ownership therefore of each full ball hereinafter mentioned for the whole of Yarnton Mead carries three strips in Oxhey, one in each of the three divisions thereof, in whole 5 customary acres; and five strips in West Mead, one in each of the five divisions thereof, in whole 6 customary acres. There are governing the allotment of the strips in Yarnton thirteen cherry-wood balls each having a different name thereon, and the ownership for the year, of each strip is governed by the drawing of the thirteen balls: but without adding a plan of the Mead I am unable to describe the method of drawing.

The ownership of any of the governing balls may be divided; thus a person may own only half of the ball called, say, "William of Bladon" drawn for the whole Yarnton Meadow, or only for Oxhey; where there is such consequent division then in drawing of a strip, the two Meadsmen (the officers appointed by the Lot-holders) apportion the strip drawn to that ball fairly between the owners. It is a tradition in the village of Yarnton that originally Oxhey, West Mead and Pixey (which latter mead was never governed by the drawing of the thirteen balls above mentioned) were all drawn for in that order on the same day: but that in 1817 the then Vicar of Yarnton secured that Oxhey should be drawn for on the first day, West Mead on a later day, and Pixey on a still later day. The drawings are early in July.

The reason for this reform was that the drawing of the whole of Yarnton and Pixey on the same day brought crowds of mowers, largely Irish, into the village, and the drunkenness and fighting that ensued in the village towards evening.

The names of the thirteen balls written thereon respectively, the drawing of which governs the allocation of the strips in Oxhey and West Mead, are William of Bladon, Gilbert, Waterey Molly,

Geoffrey, Boat, Dunn, White, Parry, Harry, Boulton, Freeman, Green, and Rothe.

It is possible, though I have no evidence of this, that originally when few could read, or write, these balls were painted, each in a distinctive way. After the grass is cut, the Lotholders common over the whole Yarnton Mead, but whether "Tydalls" carries common rights I do not know. The Meadsmen claim the right to vary the day according to the season when such commoning may begin.

There is no doubt that in an ancient Meadow, the various proprietors may each have the legal fee simple in the soil of so much acreage, ascertainable as to the actual situs of such acreage, and moveable periodically according to allotment.

Such a meadow is called a *Lot* meadow, and the judicial authority on the subject is concentrated into a few years. In 29 El. A.D. 1587 GENT, B., has the dictum (*a*): "Where many have Lot Meadow to be divided every year by Lot, who shall have the grass of such an acre etc., and so change every year according to Lots, they have not any freehold therein but only vesturam" and in the following year the Chief Baron has a similar dictum (*b*).

A grant of mere vesturam does not carry the soil, and would confer only an incorporeal profit *à prendre*. But as a general proposition they were both wrong. In 34 El. A.D. 1592 the important case of *Welden* v. *Bridgwater* (*c*) came up for adjudication.

The case was this: The plaintiff, who was lord of the manor of *Paunchborn*, brought against the defendant trespass quare clausum fregit vocatum *Bear Meadow* apud *Punchborn* and his grass there growing.

On not guilty pleaded: it was found by special verdict that the plaintiff was seised of the manor, wherein there was a meadow called *Wide Meadow* containing 80 acres, whereof the place is parcel, that from time whereof etc. the meadow had been divided by Lot between divers persons *pro captione foeni de herba proveniente*; that from time whereof etc. the plaintiff and all those whose estate etc. have used to have had allotted to them yearly out of this meadow 13 acres, which being allotted is called *Bear Meadow*, that the place where, was allotted to the plaintiff, and that the defendant entered and cut down the grass.

On this Atkinson, for the plaintiff, seemed to think that if the plaintiff owned only an incorporeal exclusive profit *à prendre* he

(*a*) *Anon.*, 4 Leonard 43.
(*b*) *Calton's Case*, Owen 37.
(*c*) Croke El. 421; Co. Litt. 4 (a) 42 (a) and (b); Moore 302.

could not maintain trespass *quare clausum fregit*; and so he argued that the allotment under the custom gave the plaintiff a several estate in fee in the soil of his moveable acreage; and (italics my own) "of that opinion was the *whole* Court, for it may be good by *prescription*; and *by the allotment it is the proper soil and freehold* of him to whom it is allotted; and that he well might maintain a quare clausum fregit. Wherefore it was adjudged for the plaintiff" (*d*).

Moore (*e*) has a scrappy note of this case, in which he says it appeared that the plaintiff had but the crop and vesture of the lands as lot acres to his lot each three or four years, and yet it was adjudged that he could have trespass *quare clausum fregit*, and that he who has [sole] pasture by *Fenner* and *Gawdy* shall have trespass *quare clausum fregit*.

The two reports, Croke's and Moore's, can, we think, be clearly reconciled in the view that the whole Court held, as Croke says, that the plaintiff had the soil; but went on to add that had he had only the incorporeal profit *à prendre* of sole *vesturam*, he could equally have maintained trespass for invasion of that particular right (*f*). If these reports are irreconcilable, then Croke's, obviously by far the better and fuller, must prevail, even if we had no independent corroboration of Croke.

But we have the completely independent report of Coke who in A.D. 1592 was Solicitor-General, in effect completely confirming Croke's version of the case: he cites the case as otherwise unreported in his margin to his first edition published in A.D. 1628 (*g*). Sir George Croke's reports were first published in A.D. 1657 and Serjeant Moore's in A.D. 1663.

It is obvious that in these few years Lot Meadows were the subject of considerable interest. In the very next year, A.D. 1593, we find the tenants of *Aston* Manor, again in the county of Oxford, trying to record their custom as to *Aston* Mead, no doubt in anticipation of their later dispute with the lord, which occurred in A.D. 1657 (*h*).

Since this decision of *Wellden* v. *Bridgwater* it has never been doubted that an ancient practice of annual allotment proves a fee in the soil of the allottee's (*i*) moveable acreage: at all events

(*d*) Croke El. 421. (*e*) Moore 302.

(*f*) A point conclusively established by other authorities. Co. Litt. 4 (b); *Wellaway* v. *Courtier*, [1918] 1 K. B. 200; *Wilson* v. *Mavretty*, 3 Burrows 1824; *Back* v. *Daniells*, [1925] 1 K. B., at p. 542; *Richards* v. *Davies*, [1921] 1 Ch., at p. 95.

(*g*) Co. Litt. 4 (a).

(*h*) Williams' Commons, chap. 7.

(*i*) See Dodderidge in The Touchstone, 206; Rolle in his Abridgment, 1 Rolle Abr. 829 C (1); Orlando Bridgman while counsel in Williams' Commons, p. 93; Preston in Estates, I, p. 258; Joshua Williams in Commons, p. 79.

where no third person establishes his right to the soil of the whole mead. And the Legislature has recognised the position : for Lot Meadows are subject to be enclosed under *The General Enclosure Act*, 1845, see section 11 : " and all Lot Meadows and other lands the *occupation* or *enjoyment* of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise, shall be land subject to be inclosed under this Act."

It is very obvious, as appears both from CROKE and COKE, that it is the immemorial allotment which proves the soil in his moveable acreage, and not a mere profit *à prendre* therein, to be in the allottee.

If, indeed, a third party, or the lord of the manor could affirmatively show that the actual soil of *the whole meadow* was in him; then, I conceive, there is nothing in law to prevent the allottee having merely a moveable incorporeal profit *à prendre* (*k*).

But the onus of establishing that the soil of the whole meadow was in him would lie on the third party or the lord; and it is difficult to see how he could possibly discharge that onus, except on the past actual admission of all the then Lotholders that he did hold the soil.

The mere custom inevitably requires that the Lotholders should maintain the posts or marks indicating the boundaries of each of the strips to be allotted : and this, except the cutting of the grass, would be the only act of ownership to which such a meadow would be susceptible as a general rule.

In the cases of *Wide Meadow* (in *Welden* v. *Bridgwater*), *Aston Mead*, and *Yarnton Mead*, the lord of the manor was also a Lotholder : but only in the case of *Aston Mead* does he appear to have claimed the soil in the whole meadow, and ORLANDO BRIDGMAN (*l*), while counsel, obviously applying *Wellden* v. *Bridgwater*, was of opinion that not he, but the Lotholders held the soil.

In the case of Yarnton Lot Meadow there was, further, a distinct act of ownership by the Lotholders, beyond the immemorial allotment and maintenance of boundary posts and the fact that the

(*k*) The dicta 4 Leonard 43; Owen 37, would be in support if needed. There could, I conceive, be no legal objection to a man owning a 30-acre meadow at this day granting that each of ten specified persons and their respective successors in title should thenceforth enjoy a separate 3 acres in that meadow, the actual site of each of which 3 acres was each year to be determined by Lot, as a perpetual mere incorporeal right of sole *herbagium* up to a specified day in every year; and that thereafter till a specified day the whole ten should have equal *common* rights of common over the whole meadow. Such a grant would immediately vest in interest his right in each of the ten, and could not be objectionable as a perpetuity.

(*l*) Williams' Commons, 92, 93.

lord was one of the Lotholders, *viz.*, that by their officers, the two Meadsmen, the proprietors in the meadow had for many years collected 1s. per barge towed along the Isis over the path on the meadow side, and had expended such sums solely on the meadow, repairing direction posts flooded away, etc.

It is true that there is a presumption that the lord is seised of the soil of the *waste* (*m*) of a manor: but I know of no case suggesting a presumption that the lord is seised of the soil of an ancient enclosed meadow within the bounds of the manor, even though that meadow is *not* subject to immemorial allotment. It is the writer's belief—which of course he cannot prove—that these Lot Meadows existed in their mode of allotment long before the idea of the manor, as we now understand it, was ever evolved.

If, indeed, any Lots in such a meadow are parcel of a manor the right to such moveable Lots would pass under the mere conveyance of the manor (*n*).

But the actual physical Lot which for the moment stands allotted to the holder should not be conveyed by its metes and bounds (*o*); but according to circumstances a different mode of conveyance should be adopted as, *e.g.* "all my 8 customary acres lying in the Lot Meadow containing —— acres or thereabouts known as —— in the parish of —— in the County of ——". Such a conveyance will pass the 8 customary acres wheresoever the actual site thereof from time to time falls (*o*); but after the word "customary" it would do no harm to add the words "and moveable".

From the expressions above cited from CROKE'S report of *Welden* v. *Bridgwater* and from COKE'S report Co. Litt. 4a of that case, it is obvious that to enable the claimant to sustain a claim to the *soil* in his moveable acreage the custom of annual or other periodical allotment must be, or be capable of being presumed to be, from time immemorial, *i.e.*, to have originated not later than the first year of King Richard I (*p*).

(*m*) Williams' Commons, 150; *Att.-Gen.* v. *Reeveley*, *ib.* p. 155; *Doe d. Earl of Dunraven* v. *Williams*, 7 Car. & Payne 332.

(*n*) Co. Litt. 48 (b), 343 (b).

(*o*) If it were, however, conveyed by metes and bounds, we suggest that the conveyance would now pass the grantor's right as represented temporarily in the acreage conveyed by metes to all allotments in respect of that right in the future. All conveyances since the abolition of Fines and Recoveries and of the tortious operation of feoffments, are innocent, and convey only what estate the grantor has, and not a tortious estate. Perhaps the All Estate clause, *L. P. A.* 1925, s. 63, *C. A.* 1881, s. 63, might apply.

(*p*) Williams' Commons, 7; preamble to Prescription Act, 1832; *Mercer* v. *Denne*, [1905] 2 Ch. p. 577. In the case of Yarnton Meadow there was living evidence of the mode of drawing and allotment for the last forty years given by statutory declaration; forty years' uncontradicted evidence is, of course, amply sufficient to found an immemorial custom.

We have here an exception to the general rule that corporeal land cannot in English law be in strictness "prescribed" for : but in a somewhat similar way a man could prescribe that he and his ancestors had been tenant in common with others of corporeal land (*q*).

The *Prescription Act*, 1832, has no application, for it applies only to claims to incorporeal rights, and even so not to claims to incorporeal rights in gross (*r*).

It may be of interest here to observe that there are instances of a particular tenant of a manor having the exclusive particular profit, *e.g.*, the exclusive right to take thorns on or turf off a particular spot only, in the manorial waste, in exclusion not only of the lord, but of other tenants of the manor (*s*), though the other tenants may have common of pasture over that spot as well as over the rest of the waste.

Sometimes, however, the tenants of a manor for convenience in practice between them appropriate separate portions of the waste, as to carry pasture each for his farm : but appropriation for convenience is not binding on the lord or on the tenants (*t*).

If it could be conclusively shown that though the custom of allotment had held for such length of time as to induce the presumption of immemorial origin, it yet first originated after 1189 A.D., then it would be difficult to uphold the custom (*u*) as carrying the soil with the allotment; unless indeed after long user the Court would presume a lost Act of Parliament, originating or confirming the then already originated custom.

But the mere production of a deed bearing later date than 1189 A.D. purporting to be a grant by the lord of the manor or other then owner of the land, of such moveable acreage in his meadow, need not necessarily prove that the custom originated after that date; such a deed might possibly be construed merely as an attempted confirmation of a previously existing valid custom (*x*).

(*q*) Litt. s. 310.

(*r*) *Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; *Mercer* v. *Denne*, [1904] 2 Ch. p. 554; [1905] 2 Ch. p. 586.

(*s*) *Dowglass* v. *Kendall*, Croke Jac. 256; *Wilson* v. *Macreth*, 3 Burrows 1824, where he had the right to sell the turf so cut.

(*t*) *Att.-Gen.* v. *Reeveley*, Williams' Commons 155; *Hall* v. *Byron*, 4 Ch. D. 667.

(*u*) Cp. *Simpson* v. *Welles*, L. R. 4 Q. B. 214; Rolle Abr. II, p. 268, pl. 2, p. 269, pl. 16 and 17, Williams' Commons, 5. Where the usage had been proved for a sufficient time to found the presumption that it was immemorial, that presumption would not be rebutted by proving that there had been a time subsequent to 1189 A.D. when physically it could not have held, it must then be shown that *in* 1189 A.D. *itself*, the custom could not have existed. See *Mercer* v. *Denne*, [1904] 2 Ch., at pp. 555, 556—Farwell, J.

(*x*) Compare *Addington* v. *Clode*, 2 Sir Wm. Bl. 989; Rolle Abr. II, p. 271, T. pl. 5; Williams' Commons, 7.

It is obvious that where such custom of annual allotment exists, there could not be a valid custom for the proprietor of a moveable acreage to enclose his site allotted for the particular year as to be in future his static acreage : for the second alleged custom, if established, must necessarily be destructive of the first (*y*).

But in the old arable common fields where the strips were *static in ownership* a valid custom might be proved, allowing the owner of a strip to enclose it, and thereby for ever afterwards to keep out the cattle of the other proprietors in the field from commoning over his enclosed strip after the crops cut, and to free the strips of the other proprietors from common by his cattle in respect of his strip enclosed. If such an enclosure in practice resulted in that position, this proved that the common rights of the proprietors in the field were " pur cause de vicinage ", not strictly rights at all, but affording so long as the strip remained unenclosed an excuse for what otherwise would have been a trespass (*z*).

It does not actually appear in the case of *Welden* v. *Bridgwater* that after such a date when the hay would have been cut, the respective proprietors had rights of common over the whole meadow : but in other meadows this is the case as in Yarnton Mead and in Aston Mead (*a*).

The proprietors in a Lot Meadow are clearly not tenants in common of the meadow. It is essential as to tenants in common that " none of them know of this his severall, but they ought by the law to occupy their lands or tenements in common and *pro indiviso* to take the profits in common " (*b*).

Hence, of such interests there could not be compulsory partition at common law (at common law only parceners could compel partition) nor under statute, for the *Partition Acts*, 31 *Hen.* 8, *c.* 1, 32 *Hen.* 8, *c.* 32, extended the compulsory right only to joint tenants and tenants in common. But a man, though originally several owner of a thing, may by subsequent confusion become tenant in common thereof : as if parcels of tallow belonging to several owners are melted by fire into one undistinguishable mass (*c*).

It follows from the above principles that the Statutory Provisions as regards undivided shares in land and open spaces have no

(*y*) *Day* v. *Spooner*, 1 Rolle Abr. 565, Custom, C, (1); *Bland* v. *Moseley*, reported (*ib.*) p. 566, and in *Aldred's Case*, 9 Coke, at 58 (a).

(*z*) *Sir Miles Corbet's Case*, 7 Coke 5; *Barker* v. *Dixon*, 1 Wilson 44; *How* v. *Strode*, 2 Wilson 269 : but such a custom could hardly justify the exclusion of common in respect of an area outside the bounds of the common field : *Hickman* v. *Thorne*, 2 Mod. 105.

(*a*) Williams' Commons, chap. 7.

(*b*) Litt. s. 292; to the same effect is the preamble to the first Statute of Partition, 31 Hen. 8, c. 1.

(*c*) *Sinclair* v. *Brougham*, [1914] A. C., at pp. 458, 459.

application : *L. P. A.*, 1925, *s.* 39 (4) (5), *First Sched.*, *Part IV* (1) *and Part V* (2).

There is, as we have seen, an enclave in each of the two portions, "Oxhey" and "West Mead", of Yarnton Meadow, called "Tydalls" the ownership of which remains constant and never drawn for, and which physically lies open to the rest of the meadow. There is nothing in law to prevent the Rector of parish A having as in gross a portion of the tithe arising in another parish B (*d*). The original owners of the whole of parish A before the Lateran Council might have appropriated some part of the tithe of parish A as to two-thirds to the Rector of B, as to one-third to the Rector of C. Then later, and before the restraining statutes of the reign of Elizabeth, the Rectors of B and C, with their patrons and ordinaries, might have entered into a real composition, whereby these enclaves in parish A in due proportions between the Rectories of B and C were granted to those Rectories in consideration of discharge of their respective proportions of the tithes in parish A (*e*).

(*d*) Watson, Clergy Law, 514, 515.
(*e*) Watson, Clergy Law, 512—515, 518; *Pigot* v. *Heron*, cited in the *Bishop of Winchester's Case*, 2 Coke, at 45 (b); Croke El. 599.

THE REAL ESTATE OF INTESTATE LUNATICS.

By G. H. Newsom, of Lincoln's Inn, Barrister-at-Law.

In this article we propose to call attention to an obscure backwater of the Property legislation of 1925. Now that the statutes have been in operation for ten years and more their principal features are widely understood; but sub-section 2 of section 51 of the Administration of Estates Act is still capable of providing unexpected effects.

It is usually supposed in a somewhat loose manner that all the old modes of devolution on intestacy were swept away and a single clear code substituted by section 46 of the Act. Unfortunately such a view is not quite accurate. Sub-sections 3 and 4 of section 51 make certain permanent exceptions in regard to entailed interests and the property of infants. Sub-section 2 makes the further exception with which we are concerned. It is true that the sub-section is quasi-transitional, but it will be of importance for many years to come. The sub-section enacts:

> "The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.
>
> "For the purposes of this subsection, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

Now there are various things to be noticed about this subsection. In the first place it only applies at all in a strictly defined class of case. The lunatic must die after 1925 entitled

to a *beneficial* interest in real estate, and must have been unable by reason of his incapacity, presumably on January 1, 1926, to make a will. He must not have recovered his testamentary capacity, as defined in the proviso, since that date. He must have been of full age on January 1, 1926, and must be intestate in regard to the interest in question. Moreover, the sub-section takes effect "without prejudice to any will of the deceased", so that if he charged his debts on his realty, but did not otherwise dispose of it, the heir will take subject to the debts.

Further, it is only "the foregoing provisions of this Part of this Act" which are not to apply. That is to say, Part IV of the Administration of Estates Act does not apply, while Parts I, II and III and the Schedules do. Now, Part IV consists of sections 45 to 52, which only affect the distribution of the residuary estate of the intestate. The sub-section therefore affects in no way the position of the personal representative for the purposes of administration as laid down in the earlier Parts of the Act: see *Re Gates*, [1930] 1 Ch., at p. 203. That case shows that the realty in question, being undisposed of, is liable rateably with the personalty for the payment of debts under Part II of Schedule I, where the whole estate is undisposed of, and it presumably follows that if the realty alone is undisposed of it comes first for payment of debts.

Next, it is necessary to consider the proviso. Farwell, J., held in *Re Gates* (at p. 202) that "the proviso merely means that a lunatic or defective *to whom a receiver or committee has been appointed* (our italics) is not deemed to have recovered his testamentary capacity unless that receiver or committee has been discharged". It is incorrect to suppose, as was suggested by counsel in that case, that the "proviso confines the sub-section to a lunatic or defective who has had a receiver or committee appointed". The first paragraph of the sub-section lays down the rules; the proviso merely directs the mode of their application in certain cases.

It is also important to observe that the sub-section only applies to "any beneficial interest in real estate (not including chattels real)" to which the lunatic "was entitled at his death". It therefore does not apply, for example, to a legal estate vested in him as a trustee: nor to a beneficial interest in an "undivided share in land", which is personalty (*Re Price*, [1928] Ch. 579): nor to leasehold interests of any kind. But it does apply (*Re Silva*, [1929] 2 Ch. 198) to money deemed by the law to be realty.

In this connection it is important to note the decision in *Re Harding*, [1934] Ch. 271. There a lunatic, otherwise within this

sub-section, died intestate in 1932. Till 1923 she had been entitled to undivided shares in land, which in 1923 were still, of course, realty. In 1923 they were sold under a conditional contract adopted by the Master and the proceeds were paid into Court. Now, sub-section 1 of section 123 of the Lunacy Act, 1890, provides :—

> "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

The next of kin and the heir contested which of them was entitled to the fund in Court, and BENNETT, J., found in favour of the heir, on the ground that, though admittedly undivided shares in land ceased to be realty on January 1, 1926, "there was no undivided interest in real estate to which the deceased was entitled upon which the transitional provisions of the Law of Property Act, 1925, could operate. All there was at that date was the sum of stock in Court, which under section 123 of the Lunacy Act, 1890, was to be regarded as land, and in which stock, which is the only property in question, there were no undivided interests at all, the deceased being entitled to the entirety". It is submitted with the greatest respect that there is some doubt whether this decision can be regarded as correct. For the Act of 1890 says that the lunatic and persons claiming through him are to have the same interest in the proceeds of sale "as he or they would have had in the property the subject of the sale . . . if no sale . . . had been made". Here, "if no sale had been made", the transitional provisions would have applied at the beginning of 1926, and the property would have been statutorily converted into personalty, and would have gone to the next of kin.

A most peculiar set of facts was discussed in *Re Berrey*, [1936] Ch. 274. There the deceased, a lunatic within the sub-section, who died in 1934, was survived by A, who would have been the deceased's heir at law but for the fact that she was born illegitimate, and B who was the heir if A was not. A was, however, a legitimated person under the Legitimacy Act, 1926, and had been legitimated by that Act on January 1, 1927. FARWELL, J., held that B must take, apparently on the ground that the heir was to be ascertained by the "general law in force before the

commencement of" the Administration of Estates Act "applicable to freehold land", and that under that law an illegitimate person could not take in any circumstances. It is not altogether easy to see how this decision is reconcilable with sub-section 1 of section 3 of the Legitimacy Act, which provides: "Subject to the provisions of this Act a legitimated person . . . shall be entitled to take any interest (a) in the estate of an intestate dying after the date of legitimation . . . in like manner as if the legitimated person had been *born* (our italics) legitimate." But doubtless the case would be followed in the unlikely event of similar circumstances coming again before the Court.

Finally, there is a rather difficult problem that has not so far been the subject of a reported decision. In all the decided cases the person to take has been a single heir: what is to happen when there are coparceners? Coparceners, unlike all the other sorts of co-owner, are not very clearly catered for in the new law. They appear, however, to be within the expression "persons entitled in undivided shares" as used in the provisions normally supposed to deal with tenancy in common. That this is so is not altogether obvious from the intrinsic meaning of that expression, but the supposition seems to be correct because coparceners are once referred to as such, along with tenants in common, in those provisions: see sub-paragraph 10 of paragraph 1 of Part IV of the First Schedule to the Law of Property Act, 1925. On this footing it is necessary to consider what the practical effect of sub-section 2 of section 51 would be where the persons to take are coparceners. As we have seen, the whole of the Administration of Estates Act applies to the estate of the intestate lunatic except Part IV. Therefore at the death the realty vests in the personal representative under sub-section 1 of section 1 of the Act. Being, *ex hypothesi*, undisposed of, it is held by him on trust for sale under sub-section 1 (a) of section 33. Under sub-section 2 of section 51 the beneficial interest is held on trust for the coparceners. Normally the personal representative would assent in their favour. But he cannot do that, as an estate held by coparceners is held in undivided shares, which is impossible for a legal estate under sub-section 6 of section 1 of the Law of Property Act. But, provided they are of full age, they are entitled, as being persons entitled in undivided shares to the beneficial interest, to call for the legal estate to be vested in them as joint tenants on trust for sale under the proviso to sub-section 1 (b) (ii) of section 3 of the Law of Property Act, and the representative can execute an assent in their favour as such under sub-section 1 of section 36 of the Administration of Estates Act. Under sub-section 7 of the

same section the assent will be conclusive in favour of a purchaser. If any of the coparceners are infants this procedure is not available by reason of the wording of sub-section 1 (b) (ii) of section 3 of the Law of Property Act, and because an infant cannot hold a legal estate. It is submitted therefore that in such a case the representative should himself retain the legal estate so long as the minority lasts, and administer the property under the powers conferred by section 39 of the Administration of Estates Act. Or, if a partition is expedient for any reason, he could make it under sub-section 3 of section 28 of the Law of Property Act, acting himself on behalf of the infant under sub-section 4 of the same section, and retaining the infant's partitioned share until the infant is of full age and an assent can be made in her favour. In the meantime he can assent to the vesting of the shares of the adults in them in severalty in the ordinary way.

THE LIBRARY.

INDEX TO CONDITIONS OF SALE. By THOS. R. ELDRIDGE, Solicitor of the Supreme Court. pp. 14. The Solicitors' Law Stationery Society, Ltd., 22 Chancery Lane, W.C.2. 1936. 2s. 6d. *net.*

This pamphlet is an analysis of the conditions contained in the National Conditions of Sale, the Law Society's Conditions and the Statutory Conditions, which gives very readily the contents of these three sets of conditions and enables a user to ascertain with a minimum of effort the number of any condition affecting the matters within their scope. The Index also includes a reference to some of the important provisions of the Law of Property Act, 1925, affecting contracts and in respect of which there may also be a condition in some cases. There is also one reference to the Land Registration Act but it is thought that there should be none or more. It is also suggested for a future edition that where there are some variations in these conditions in those employed by local Law Societies such as the Birmingham Law Society, the value of the work would be further enhanced by the incorporation of references to these variations for the benefit of practitioners who are not familiar with them. The Index is of considerable value to practitioners since the use of these voluminous forms even in contracts by private treaty renders it highly desirable for those called upon to draw or peruse contracts to have a convenient system of reference.

The pamphlet also contains some practical notes on Particulars of Sale and Special Conditions. These are very short and it is open to question whether they should not be amplified or omitted; at the least some reference to a standard work such as Williams' Vendor and Purchaser might be incorporated.

CONVEYANCING, LAND REGISTRY AND PROBATE AND ADMINISTRATION COSTS. Second edition. By A. GEO. CALTON. pp. 144. London: Stevens & Sons, 119 & 120 Chancery Lane, W.C.2. 1936. 7s. 6d.

This is a most conveniently arranged little book giving scales of costs, in many cases with the $33\frac{1}{3}$ per cent. added, in the

matter comprised in the title. There are also a few practical notes appended to some of the subjects. The problem of these costs constantly affects the practitioner or his clerks and it would be difficult to find anything more adequate to meet his needs in such a compass. It can be heartily recommended as a book to buy and keep in the drawer of every conveyancer's desk.

Williams' Law of Vendor and Purchaser. Fourth edition. By the Author and John M. Lightwood, of Lincoln's Inn, Barrister-at-Law, M.A., one of the Conveyancing Counsel to the Court, formerly Fellow of Trinity Hall, Cambridge. Two volumes. pp. ccvii + 1446. 1936. London : Sweet & Maxwell, 3 Chancery Lane, W.C.2. Price £4 17s. 6d. *net*.

When reviewers, very rarely, and publishers, rather more frequently, refer to a legal work as a classic it is not always easy to determine what is thereby implied. Lawyers have been the subject of English literature, a few members of the profession have contributed to English literature, but not many legal treatises could be ranked as English literature. There may be critics who will say that English law cannot be the subject-matter of literature, but it is doubtful whether such critics are familiar with some of the judgments that have been written or with the masterpieces of English law. If to write with a style that bears the hallmark both of culture and the author's individuality, with an exceptional command of language, and displaying mastery of the subject without avoiding difficulties for the sake of simplicity, be the criterion of a "classic", then this palm must be awarded to "Williams' Vendor and Purchaser". It is something more than a learned work and can be read with pleasure as well as studied with profit. It belongs to an age when conveyancers sought to clothe their drafts with elegance and beauty, however encumbered with technical phraseology, and before precedents aimed at commercial brevity rather than English and clauses could be kept by a card index system. Let us hasten to add that it is none the less practical and the standard work which every conveyancer should have on his shelves to consult in the numerous difficulties that beset his path arising from contracts of sale and the investigation of title.

This is the first edition since the legislative activity of 1925 and the work loses nothing from the lapse of time which has enabled the authors not merely to master the subject but to enjoy the advantage of judicial interpretation on some of the many

difficulties to which it has given rise. The lamented death of the author left the work in an unfinished state. The first seven chapters (pp. 1—297) are substantially the work of the author; the remainder of the book is edited by Mr. Lightwood, who has in parts rewritten it, such, for example, as the chapter on registered land. This has been necessitated by the 1925 legislation and it is no reflection upon Mr. Lightwood that these are, on the whole, the least readable portions of the book. Statute does not afford much opportunity for good writing and the no doubt necessary incorporation of sections of the Acts renders some parts unpalatable though essential to the practitioner.

Mr. Lightwood's reputation for learning and authorship are too well known for this reviewer to indulge any anonymous whim for patronage in saying that his contribution is well done and maintains the high standard of the learned author. It is sufficient that his name appears as responsible for this edition.

As all great men are reputed to have, Mr. Williams had a weakness, which in his case was the incorporation of important questions of law and practice in footnotes. This edition provides no exception to its predecessors and it is suggested that in future editions an attempt might be made to include much of the learning, now buried in footnotes, in the text itself. As matters stand there is a spurious shortness in the book because its information is more extensive than the number of pages would seem to imply.

One other point may be the subject of tentative criticism. It is disappointing to find that on the whole the matter dealing with the statutory interpolations is not as exhaustive or critical as those parts dealing with the Common Law and Equity. No one can deal more admirably than Mr. Lightwood with all the obscurities that arise from such topics as the question of settled land, joint tenancies and undivided shares in land, to enumerate no more, and it is to be regretted that he did not see fit to be more elaborate. In this connection special mention may be made of the chapter on Registered Land. In eighty-four pages the learned editor, who has rewritten the chapter, has compressed, with masterly conciseness, the relevant provisions of the Act and Rules, but it is doubted whether this can do justice to a subject of rapidly increasing importance and considerable complexity and difficulty. Registered conveyancing is based in large measure upon the older system, and if and when it is the only method of conveyancing much of the older law will remain as part of it; but it is thought that either it should be omitted altogether, and there is much to be said for this, or else it should receive at least as full

treatment as all other topics and that the matters should be dealt with in the chapters relating to those topics and not be relegated to a kind of appendix.

These observations are, however, matters of general principle upon which manifestly different opinions may be held. They do not in any way affect the estimate of the general excellence of the work, which should find itself on the shelves, and not from a lending library, of every conveyancing practitioner.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND PROPERTY CASES.*

Breach in sea wall—continuous and apparent easement—Land Drainage Act, 1930.—In *Symes* v. *Essex Rivers. Catchment Board*, [1936] 2 All E. R. 551, certain land below sea level was drained through a breach in a sea wall by means of a sluice. This sluice, made in 1931, had replaced an earlier culvert which had apparently become useless. The sluice was inserted with the approval of the neighbouring owner and the then Catchment Board. In the same year part of the land so drained was sold and Atkinson, J., held that the conveyance operated as an implied grant of the right to send surface water through the sluice and into the dyke on the ground both that it was an apparent and continuous easement and also under the Law of Property Act, 1925, s. 62. It is to be noticed that this appears to be the right to allow all surface water to escape from the land provided that it does so ultimately through a defined channel. What is not equally clear from the report is whether the defined channel must border upon or be on the land of the person claiming the right or easement or whether, for example, it could flow into an open space first and so through the defined channel.

After the sale a new Catchment Board was formed and this Board stopped up the channel. The main part of the report is concerned with the contention of the Board, first, that a breach in a sea wall cannot be claimed as of right, and, secondly, under the Land Drainage Act, 1930, the Board had a statutory right and duty to block the sea wall to prevent sea water draining to the river. Both these contentions were rejected by the learned Judge, but they appear to have less general application than the first point, which unfortunately is treated less fully.

Highways—dedication under the Rights of Way Act, 1932.—In *Merstham Manor, Ltd.* v. *Coulsdon & Purley U. D. C.*, [1936] 2 All E. R. 422, Hilbery, J., was called upon to interpret the

meaning of the words "actually enjoyed by the public as of right and without interruption" contained in the Rights of Way Act, 1932, s. 1. With regard to the words "as of right" the learned Judge held (at p. 427) that they meant that they were satisfied "if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given". In so holding the learned Judge was following the principle *nec vi nec clam nec precario* which has been applied to rights of way enjoyed over one tenement in respect of another, though his lordship expressed the opinion that it was easier to appreciate the application of the principle to private than to public rights of way. "Actual enjoyment" must be regarded as a matter of fact to be established and this again follows the principle laid down in the Court of Appeal in *Hollins* v. *Verney* (1884), 13 Q. B. D. 304, at pp. 308, 309. With respect to the words "without interruption" the learned Judge held that they applied to interruption of the right and not the period of enjoyment and must be construed properly "as meaning actual and physical stopping of the enjoyment and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment." This last interpretation also follows the decisions on the Prescription Act, 1932, but in that Act, of course, section 4 determines more exactly what is meant by "interruption". His Lordship cited with approval the practice of such bodies as the Inns of Court who took the precaution of closing their ways for one day in every year as constituting an "interruption".

It should be added that under the Act there will be no implied dedication where there is sufficient evidence that there was no intention during the period of twenty or forty years respectively to dedicate a way. Whether there is such evidence is a question of fact in each case but it is apparent that mere isolated acts of challenge are not sufficient. It appears that where there is the necessary user nothing short of physical obstruction repeated will be readily construed to prevent implied dedication.

The facts of this case are too complicated to enumerate in a short summary and little is to be gained from them save as read *in extenso*. It may be mentioned, however, that users of the way had been told from time to time that they were trespassers and probably the user began by tolerance of the landowner. What was not necessary to bring out was whether a gate capable of being opened and in fact opened by persons using the way would constitute an interruption. It is thought that this problem will be raised particularly in agricultural parts of the country that are subsequently developed for building. In fact it is thought that

this Act may have more importance for purchasers than has, perhaps, been realised. At the moment it only emphasises the necessity of inspecting the land prior to entering into contract, since it is doubtful whether and how far it may be necessary to disclose the existence of a highway impliedly dedicated under this Act. Indeed this further point is one which may give rise to difficulties on contract and even render the vendor liable on his covenants for title: see, however, *Stoney* v. *Eastbourne R. D. C.*, [1927] 1 Ch. 367.

Rectification of contract—intention prior to completed contract. —*Shipley U. D. C.* v. *Bradford Corpn.*, [1936] 1 Ch. 375, is a case of interest to conveyancers primarily for the general principle laid down rather than the facts involved. The action was brought for construction of a lease of water rights, and, in the alternative, for rectification of the lease so as to give effect to the construction contended for in pursuance of communications passing between representatives of the council and the corporation. The point of construction turned upon the precise facts and is immaterial to this note, though the Court accepted the plaintiff's contention which was upheld on appeal. As Luxmoore, J., felt that his view of the construction might be overruled he also dealt with the point of rectification. For the defendants it was argued that the corporation could only contract under seal, that apart from the lease there was no concluded contract, and that, therefore, the communications passing prior to the lease could not form the basis of any claim for rectification. This view was supported by observations and *dicta* in a line of authorities and follows opinions expressed in a number of textbooks. The point put shortly is that there cannot be rectification of an instrument except to give effect to a pre-existing contract and it was common ground that in this case no such contract existed. Luxmoore, J., however, held that even in the absence of a concluded contract under seal the lease could be rectified to give effect to the intentions of the parties at the time of the execution of the lease as expressed in the negotiations between the representatives of the council and the corporation. As the learned Judge pointed out (at pp. 394—397) it would have been contrary to a line of ancient authorities to hold otherwise than that the concurrent intention of the parties at the time of executing the instrument is the basis on which rectification of a contract must depend, but that there was authority in the books for the view that the Court does not rectify contracts, but

only instruments made in pursuance of contracts, and in particular there were *dicta* to this effect in two comparatively recent cases : *Faraday* v. *Tamworth Union* (1917), 86 L. J. Ch. 436; *Higgins* v. *Mayor of Northampton*, [1927] 1 Ch. 128. In these circumstances the analysis of the line of decisions (not made in the two cases just cited) in this judgment is of importance and lays emphasis particularly on the negotiations preceding the grant of a lease, since in such circumstances there is comparatively rarely a pre-existing concluded contract. It should, however, be mentioned that the Court is at all times somewhat reluctant to rectify an instrument and will do so only on the clearest evidence of mutual mistake in expressing the intention of the parties.

Restrictive covenants—benefit passing to assigns.—Recent cases have (see *Re Sunnyfield*, [1932] 1 Ch. 79; *Re Union of London and Smith's Bank*, [1933] Ch. 611) emphasised the difficulties confronting purchasers from a covenantee attempting to enforce restrictive covenants in the absence of a building scheme. *Re Ecclesiastical Commissioners*, [1936] 1 Ch. 430, is, therefore, of importance in showing a formula which will apparently in normal cases be effective provided, of course, that the assigns have land sufficiently adjacent to benefit by the restrictions. The case arose out of an application under section 84 (2) of the Law of Property Act, 1925, to the Court to declare whether a restriction was binding on the freehold land alleged to be affected and related to land in the same district as that concerned in *Re Sunnyfield* (*supra*), where the Ecclesiastical Commissioners had also been the original grantors and in which the covenant was held not to be enforceable. In the case noted the Ecclesiastical Commissioners had granted in 1887 certain freehold land subject to a covenant by the grantee for himself and his assigns to the intent to bind not only himself, his heirs, executors and administrators, but also all future owners and tenants of the land, and so that the covenant should run with the land with the Ecclesiastical Commissioners and their successors " and also as a separate covenant with their assigns owners for the time being of the land adjoining or adjacent to the said land " thereby conveyed.

In this case there appears to have been no " adjoining or adjacent " land retained by the grantors in 1887, but there was such land that had formerly belonged to the grantors and been assigned by them prior to 1887. Luxmoore, J., held that these assignees were separate covenantors and could enforce the restric-

tive covenants under section 56 of the Law of Property Act, 1925 (replacing and extending section 5 of the Real Property Act, 1845), although they were not parties to the deed.

It is to be observed that this formula will enable restrictive covenants to be imposed upon separate plots and enforceable by purchasers prior in time to the conveyance of the covenantor, provided at least that the covenant is capable of running with the land, though this point has yet finally to be decided : see *Dyson* v. *Forster*, [1909] A. C. 98, at p. 102, and the case noted at p. 438. It is not equally clear whether by means of such a formula the usual necessity of an express assignment at or before the date of conveyance of the covenant to a grantee of part of the land may be avoided : see Williams' Vendor and Purchaser, 4th ed. pp. 535, 536, and particularly p. 535, n. (*g*) and 536, n. (*i*). It may be argued that no benefit can accrue under section 56 of the Law of Property Act, 1925, to assigns who must, from the nature of things, be ascertained only after the date of the covenant as they can hardly be covenantees not party to the deed. At the same time this will leave the law in a peculiarly unsatisfactory state and it may well be argued that if existing assigns are to be benefited there must be a clear intention to annex the benefit to all " adjoining or adjacent " land, and that therefore the benefit will pass without express assignment : see *Re Union of London and Smith's Bank* (*supra*) and *Drake* v. *Gray*, [1936] Ch. 451, and it is thought that this construction must prevail.

In *Drake* v. *Gray* (*supra*; and see Conveyancer, v. 21, p. 160, Mag.), the facts were essentially peculiar and arose out of a partition deed by trustees between beneficiaries under the trust. Here the covenanting words by the trustees were " for themselves and their assigns " to the intent that the covenants should bind the land " with the respective parties . . . and other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned ". The plaintiff was a purchaser of part of one of the plots originally partitioned and the defendant was a purchaser of part of another portion so partitioned. There was no express assignment of the benefit of the covenant, but the Court of Appeal held that the words " the owners or owner for the time being of the remaining hereditaments " showed an intention to annex the covenant to every part of the land so partitioned, and that, therefore, the plaintiff was entitled to an injunction restraining the breach. It is submitted that the words in the case just noted are much stronger and by a parity of reasoning will render the covenants enforceable without express assignment in favour of purchasers of plots after the conveyance containing the covenants

sought to be enforced as well as in favour of purchasers of plots before such conveyance.

It may be added that one advantage of the Land Charges Act, 1925, rendering necessary the registration of restrictive covenants to be enforceable against purchasers of a legal estate, will be the gradual elimination of the problem of the enforceability of restrictive covenants, which constantly perplexes conveyancers. It is suggested that where the grantor takes the trouble to register restrictive covenants against the part of the land sold there is some evidence, if not conclusive, of an intention that the covenants should enure for the benefit of the land retained and not amount merely to a covenant intended to enable the grantor to dispose of the remainder of the land to greater advantage. At the same time it is clear that this argument does not go the whole way, and, furthermore, it will be of little or no practical value in the case of land registered under the Land Registration Act, 1925, since the law does not demand registration under the Land Charges Act and the practice is to insert on the register an entry of all restrictive covenants; and see *Willé* v. *St. John*, [1910] 1 Ch. 325, though how far this may apply to the 1925 Act is a matter of doubt.

Fishery—interference actionable without proof of damage.—*Nicholls* v. *Ely Beet Sugar Factory*, [1936] 1 Ch. 343, is principally of interest as a matter of liability in tort, but it does explain the character of infringement of incorporeal hereditaments. The case arose out of river pollution and was an action for an injunction and damages for injury to a several fishery, but the claim did not show any pecuniary loss. It was held by the Court of Appeal that it was unnecessary to prove any pecuniary damage to succeed in the claim as long as there was proof of legal injury, but that in this case the plaintiff had not established that in fact his several fishery was injured, that is, that fish, which could have been caught in his fishery, had been killed.

The importance of the decision lies in the prior widespread belief that to protect profits of this character, and perhaps most incorporeal hereditaments, it was necessary to prove actual damage since the old form of action protecting it was an action on the case for nuisance. The decision noted establishes rights of this nature more firmly as being absolute and protected against any interference which does not fall within the maxim "de minimis, which is always difficult to apply": *per* Wright, M.R., at p. 353.

Priority of mortgages—Law of Property Act, s. 113.—In *Beddoes* v. *Shaw* (1936), 2 All E. R. 1108, X employed a firm of solicitors to invest £2,000 in mortgage on a farm and this mortgage was duly granted. The plaintiff was the surviving executor of X of whom the deceased executor was one member of the firm whose mortgage was never in fact paid off. At a later date the defendant Shaw employed the same firm to invest £2,000 in mortgage and his claim was based on the fact that from that date the sum was treated in the books of the firm as paying off X's mortgage in respect of which Shaw was paid interest, and that there was, therefore, something in the character of a declaration of trust. At a later date still the defendant Mrs. Gregory directed the surviving member of the firm to invest rather more than £2,000, and received, after pressure, the title deeds and the mortgage of the same property. On behalf of Mrs. Gregory it was argued that her interest, though last in point of time, was prior in point of law by virtue of section 113 of the Law of Property Act, 1925, which provides that a person dealing in good faith with a mortgagee, or with a mortgagor, if the mortgage has been discharged, released or postponed, shall not be concerned with any trust affecting the mortgage whether or not he has notice thereof. With regard to this contention Bennett, J., said (at p. 1111): "The fallacy that underlies this argument is the suggestion that section 113 was intended to alter the law with regard to equitable titles, when in fact it was mainly concerned with relieving persons investigating titles; and was not intended to affect the interests they acquired. If a person acquired a legal interest he got it unaffected by notice of any trust; but if he acquired an equitable interest there is nothing in the section which gives him priority over other holders equal to himself but earlier in time." Bennett, J., held that the interests took effect in order of priority of date.

This case clearly arose out of fraudulent dealing, as indeed do most questions of priority of equitable interests, but it emphasises that the provisions of the Property Act primarily affect purchasers of the legal estate and tend to leave to the existing law the position *inter se* of equitable rights. This problem is not, however, free from the complications provided by the Land Charges Act, 1925, since section 13, which controls priority where registration under that Act is required, is mainly concerned with all purchasers, which includes mortgagees, lessees and other persons taking an interest in, or charge on, the land, and not merely with purchasers of the legal estate, save in the case of estate contracts and charges under Class D of section 10, which includes Death Duty charges, restrictive covenants and equitable easements.

Will—construction—" my heir or heirs at law."—In *Re Hooper*, [1936] 1 Ch. 442, the case before the Court arose out of a gift to the testator's mother and wife successively, and after the death of the wife (if the wife survived the mother) upon trust " for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely ". The wife survived the mother and died in 1924, but the testator did not die till 1934. The Court of Appeal (Greene, L.J., dissenting), reversing Clauson, J., held that there was an effective gift to the person who would have been heir to the testator if he had died on the date of his wife's death. It will be observed that the effect here was to treat the two beneficiaries, whose shares lapsed by death, as effective for ascertaining the beneficiary of the share and to confer the gift upon a person who at the date of ascertainment was not the testator's heir because *haeres viventis non potest.* It was this last difficulty which led Greene, L.J., to dissent because, in his opinion (see p. 450), this would have meant implying in the will words to the effect that, in the event of the testator's wife predeceasing him, he was deemed to have died at the moment of her death.

The importance of the decision lies in the willingness of the Court in special circumstances to ascertain the person who would have been heir at a date in the lifetime of the testator in order to vest in him a gift by his designation of " heir ", and the corresponding importance of the principle enunciated in *Lightfoot* v. *Maybery*, [1914] A. C. 782, at p. 802 : " The mind never inclines towards intestacy : it is a dernier ressort in the construction of wills " which swayed the majority of the Court of Appeal in arriving at its decision. In view, however, of the conflict of judicial opinion it is thought that too great reliance on this decision should not be placed in the construction of other wills affecting the " heir " of a living person.

Will—condition in terrorem.—Of recent years the Court has definitely set its face against conditions designed to avoid gifts where the beneficiary has changed or done an act likely to change his denominational view of religion. This is not to say that the principles upon which the Court has acted have been of doubtful validity or otherwise than in accordance with the modern point of view concerning religion, and it is desirable that the law should conform with the living growth of the conceptions of the society which it serves. From the practitioner's point of view, however, there are clients who are anxious that their estate should not remain in the hands of persons holding different denominational

views, or, alternatively, are or become attracted to a particular denominational view. In these circumstances it becomes necessary carefully to consider these decisions of which the last is *Re Legg* (1936), 2 All E. R. 878. Here a testator by his will directed the property thereby affected to be held on trust to pay an annuity of £2 per week to his daughter and after her death (in the events which happened) to her children in equal shares, to which he added the following clause : " I desire that my daughter and any children she may bear should at all times conform to and be members of the Established Church of England; and at no time may any child of hers go to or be sent to any Roman Catholic school for education "; with a gift over if this wish was violated. Farwell, J., held that the first part of the condition was void for uncertainty on the ground that it was impossible to determine what particular act or omission would consist in not " conforming to " the Church of England and instanced the case where a baptised and confirmed member of the Church ceased to take any interest in its religious services. It may be added that since it seems to be quite possible to be both a member of the Church of England and a member of another denomination the purposes of the testator would be capable of being frustrated were the words " be members of " alone included. It is, however, suggested that for the purpose of drafting and in the light of the present decision the testator's purpose would most nearly be accomplished if it was provided that the beneficiary should be a member of no other religious church or body than the Church of England or such other religious body as should be in the testator's contemplation. This would not affect the rights of an agnostic beneficiary, but would at least prevent the probability of the testator's estate being devoted to a religious cause to which the testator was opposed. In *Hodgson* v. *Halford* (1879), 11 Ch. D. 950, a condition against those " who do not profess the Jewish religion " was held not invalid, but in the case of denominational religion within the Christian faith it does not seem easy to frame a similar condition, and as applied to Christianity generally it might give rise to some difficulty at the present day and in any event it is not within practical experience that such a condition usually meets a testator's requirements.

Farwell, J., also held that the condition concerning education was invalid following the decision of Bennett, J., in *Re Borwick*, [1933] Ch. 657. The ground of this decision is different and its invalidity arises from the undue restriction placed upon the parent's discretion in making the best possible provision for the education of the child. Where the objection to education in a denominational school arises from a dread of the child's religious

views being influenced it seems only possible to provide for a gift over in the event of the child actually embracing those views, which seems really a poor consolation to a testator who may have provided the very means by which the education was given. It appears to be a case in which the Courts have decided that a deceased piper shall no longer call the tune.

Will—appointment of executor but no beneficial gift—devolution on intestacy.—By the Administration of Estates Act, 1925, the Executors Act, 1830, was repealed but no corresponding section was inserted in the repealing Act. Before 1830 in most cases where property was vested in an executor without being subject to any beneficial interest under the will the executor was permitted to take the property beneficially unless a contrary intention appeared, but by the Act of 1830 an executor was deemed to hold only as trustee for the next of kin unless the contrary appeared. In *Re Skeats* (1936), 52 T. L. R. 558, a testator appointed his wife sole executrix and directed payment of his debts and testamentary expenses but did not fill up the blank after the printed words "I give and bequeath unto". Clauson, J., held that despite the repeal of the Executors Act, 1830, the widow did not take the estate beneficially as she would have done prior to 1830, but held it upon trust for the persons entitled on intestacy under the Administration of Estates Act, 1925. He was aided in this construction by the definition of "intestate" in section 55 of the 1925 Act, which includes "a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate", and the appointment of an executor does not operate as a disposition by will of a beneficial interest. While it is felt that in the particular case this was very probably not the intention of the testator, who no doubt anticipated that his widow would receive the whole of his property, the principle enunciated, it is respectfully submitted, must be sound law and it cannot have been the intention of the Legislature to reinstate the law prior to 1830 by a side wind. The case is an admirable example of the difficulty of reconciling rules of law with the fundamental principle of construing wills that the intention of the testator should prevail.

Will—accumulations rule—charity.—The novel point that was argued in *Re Jefferies* (1936), 2 All E. R. 626, was the effect of a direction to accumulate void for excess on a gift for charitable purposes ascertained at a future date. The testator directed his property not otherwise disposed of to be held on trust to pay an annuity to a beneficiary for life and subject thereto to accumulate

the income after paying outgoings during his life and after his death to hold the capital and accumulated income upon trust to divide amongst such of the London hospitals as his trustees for the time being should in their absolute discretion think fit. There were further clauses in the will which assisted the argument for the charities which was rejected. In these circumstances, since the trustees at the death of the beneficiary were unascertained, it was obvious that the hospitals to benefit could not be ascertained. The beneficiary survived the testator for more than twenty-one years and it then became necessary to decide the destination of surplus income. It was principally contended for the charities that this gift fell within the rule in *Wharton* v. *Masterman*, [1895] A. C. 186, where it was held that a direction to accumulate and pay the accumulations to the charity can be determined by the charity at any time. The gist of the argument appears to have been that as there was an ultimate gift to charity and the Court can always administer property where there is a charitable intention it was not of the essence of the gift that the charities to benefit should be unascertained until after the death of the annuitant. Clauson, J., took the view that this argument was tantamount to saying that "charity" was a definite "persona" which could own property and that this was a novel metaphysical conception, and he, therefore, held that this conception was of great interest and might become embodied in English law, but that as a Judge of first instance it was not for him to admit "this ingenious, but, I think, quite novel theory" (see p. 632), and that, therefore, the direction to accumulate was void as to excess. The report does not appear to deal with the destination of the income so freed from the direction to accumulate but presumably it was admitted that in such circumstances it would become payable to the persons entitled on intestacy as there does not seem to have been an argument that the testator had displayed a general charitable intention which would prevent failure of a gift made for charitable purposes. It is suggested that the difficulty in this case could have been avoided by providing a power of selection to arise at the appointed time with a gift over in default of exercise of the power to one or more of the hospitals to be benefited according to the wishes of the testator. It is suggested that in such a case there would be an immediate vested gift in favour of charities and by limiting the number of hospitals taking vested interests there would be no administrative difficulty in putting an end to the accumulation, though it might give rise to some question of the destination of the income if the hospitals selected for the gift over did not ultimately take under the discretion.

2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., of Gray's Inn, Barrister-at-Law.

What constitutes an Improvement.—The important question of what are improvements within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2), was raised and discussed but not finally decided in the recent case of *F. W. Woolworth & Co., Ltd.* v. *Lambert*, [1936] 1 Ch. 415, before Clauson, J., and (52 T. L. R. 732; [1936] 2 All E. R. 1523) in the Court of Appeal. That section provides that all covenants, conditions or agreements in leases against the making of improvements without licence or consent are to be deemed to be subject to a proviso "that such licence or consent is not to be unreasonably withheld". The landlord is not precluded from requiring as a condition of such consent "the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises".

The plaintiffs were lessees of a shop belonging to the defendants. They acquired a lease of adjoining land belonging to another owner, and desired to construct one large shop over the whole of the premises held by them. They proposed to pull down the back wall of the demised premises and move the staircase, lavatories, heating and ventilating apparatus away from the demised premises altogether and install them in the other part of the composite building.

By their lease the defendants covenanted not without the previous consent in writing of the lessors to erect any other building upon the demised premises "nor to make or suffer to be made any structural alterations in or additions to the demised premises"; not to commit waste; and to "use occupy and preserve the demised premises as a first-class shop". The first of the above covenants the Court construed as a covenant against the making of improvements without licence or consent, within the meaning of section 19 (2) of the Act.

The two main questions were (i) whether the defendants, in demanding £7,000 compensation as a condition of their consent, were unreasonably withholding their consent, and (ii) whether the proposed alterations could properly be described as improvements within the meaning of the Act. Since the Court of Appeal upheld Clauson, J., in holding that the plaintiffs had failed, on the evidence, to prove that the condition of paying £7,000 was unreasonable, the action failed on that ground. The second question did not therefore arise, and the opinions expressed upon it by the Court are merely obiter. The question involves, however,

such a vital question of principle depending upon the construction of the Act that it is important to consider the views expressed upon it by the Judges.

Clauson, J., at the trial and Greene, L.J., in the Court of Appeal took the view that the proposed alterations could not be described as improvements. Greene, L.J., agreed that the point of view of the tenant was to be regarded (see Luxmoore, J., in *Balls Bros., Ltd.* v. *Sinclair*, [1931] 2 Ch. 325, at p. 331), but denied that the true test of an improvement was whether it was beneficial to the tenant's business. He stated the test as, " the improvement must be an improvement to the premises which are the subject matter of the covenant and not merely an improvement which derives its character, as such, from its effect and result upon some composite building ". Here the alteration was desirable only by reason of its effect upon the composite premises. The things which it was proposed to remove were actually part of the demised premises. Greene, L.J., asks, and there would appear to be much force in the question, " Is it possible to say that it is an improvement to the demised premises that part of them should be taken away altogether, when the real benefit of that alteration is not a benefit to the demised premises at all, but is only a benefit when regarded in relation to the composite premises? " Moreover, the covenant for user as a first-class shop relates to the whole of the demised premises, and the tenant would not be using " the demised premises " as a first-class shop if he was using the demised premises minus the things which he had taken away from them.

Lord Wright, M.R., and Romer, L.J., took, however, the opposite view. They adopted as a test of what is an improvement the question, how can the tenant get, consistently with the other conditions of his lease, the most beneficial user of the premises as premises? Lord Wright said : " One way of achieving that result may be to use these premises along with and in conjunction with some other premises, and to achieve that result some structural alterations may be, and probably always will be, necessary." Apparently he would set no limit to the structural alterations which may be carried out in the pursuit of more beneficial user. Romer, L.J., regarded the alterations as improvements because the effect of them would be " to render the occupation by Messrs. Woolworth of the demised premises more satisfactory and more commodious from their own point of view ". Moreover, he took the view that after the proposed alterations the tenants could still be said to be using the demised premises as a first-class shop.

In view of these differences of opinion, the state of the law must be regarded as extremely uncertain, and it is difficult to

know what limit is to be set to the alterations and reconstructions upon which a tenant may insist. It would certainly seem reasonable, however, to draw a distinction between an alteration which, while preserving the identity of the demised premises, improves them from the tenant's point of view by enabling him to use them in conjunction with other premises, such as by the construction of openings and doorways, and a wholesale reconstruction on the other hand which destroys the identity of the demised premises and merges them in a larger composite building. It is extraordinary if an alteration of the latter kind is to be described as an improvement to the demised premises, and it is difficult to believe that that is what the Legislature intended.

Construction of section 84 (12) *of the Law of Property Act*, 1925.—In general the machinery provided by section 84 of the Law of Property Act, 1925, for the discharge or modification of restrictive covenants by application to an official arbitrator appointed under that section, applies only to covenants affecting freehold land and has no application to covenants in leases. Sub-section 12 provides, however, that where a term of more than seventy years is created in land, the section is to apply to restrictions affecting such leasehold land *after the expiration of fifty years of the term*, in like manner as if the land had been freehold.

Cadogan (*Earl*) v. *Guinness*, [1936] 1 Ch. 515; 52 T. L. R. 447, decides an interesting point on the construction of this sub-section. Leases made in pursuance of building agreements granted terms of ninety-nine years expressed to commence from the date of the building agreements, and not from the respective dates, some years subsequent, when the leases were actually executed. Clauson, J., held that in such a case the material time is the date of execution of the lease. For the sub-section to apply, there must at that date have been an unexpired residue of more than seventy years of the term, and at the time application is made under section 84, fifty years of the term must have expired subsequently to the execution of the lease. In that case fifty years had expired since the date when the terms were expressed to commence, but less than fifty years had expired since the leases were executed, so the arbitrator had no jurisdiction to entertain the application. There was no dispute that "a term of more than seventy years" had been created, as there were more than seventy years of the term still to run when the lease was executed. In order, however, to decide whether fifty years of the term had now expired, Clauson, J., had to consider the meaning of the

expression "the term", and he expressed the definite opinion that for a term of more than seventy years to be created, there must have been seventy years or more of the term still to run at the date of execution of the lease.

It must be borne in mind that this is a decision on the construction of the statute, and in no way prevents the opposite construction being placed upon a clause inserted by the parties in a lease, such as a proviso for determination "at the end of the seventh year of the term". As was pointed out by the learned Judge, the language used by the parties may well show in such a case a clear intention to calculate the time from the date when the lease was expressed to commence, and not from the date of execution. In *Bird* v. *Baker* (1858), 1 E. & E. 12; 28 L. J. Q. B. 7, a lease made in 1851 demised a house for fourteen years from Christmas, 1849, and gave a power to "determine this demise at the expiration of the first seven years thereof". It was held that the intention of both parties was that the lease should be determinable at the end of seven years reckoning from Christmas, 1849. When parties refer to the seventh year or the first seven years of the term, or some similar period, they frequently intend to calculate the time from the date when the term is expressed to commence, and if that is the intention care should be taken in drafting the lease to use appropriate language. It would, however, appear to be sufficient if, after defining the term in the habendum, reference is afterwards made to "the said term". It is a fair inference to draw that by referring back to the term as defined in the habendum the parties intend to calculate the time from the date there expressed as the commencement of the term. This is the opinion of Clauson, J. (at p. 517 in [1936] 1 Ch.) and it seems he would place the same construction upon a reference to the first seven years "of the term", as he would if the words "of the said term" were used.

Liability for Rent by Estoppel.—Not infrequently a tenant obtains from his landlord a licence to assign, and gives possession to the assignee, without making (or before making) a legal assignment of the lease. A considerable difficulty may thus arise as to the landlord's right to recover rent from the assignee, for it is well settled that a mere equitable assignee, even if he has entered into possession and paid rent, is not thereby rendered liable upon the covenants of the lease or for payment of rent. The classic authority for this principle is *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815. The equitable assignee may, however, by his conduct

estop himself from denying that he has become the tenant of the lessor.

Rodenhurst Estates, Ltd. v. *W. H. Barnes, Ltd.*, [1936] W. N. 154; 2 All E. R. 3, provides an illustration of an estoppel of that nature. The tenant of business premises contracted to assign his lease to a company to which he transferred the business. At the request of the solicitors acting for the tenant and the company, the lessor granted a licence for that assignment. No assignment was ever completed, but the company entered into possession, put its own stock-in-trade upon the premises and its name over them, and paid rent with its own cheques to the lessor. On these facts the County Court Judge held that the plaintiffs had agreed to the company being in possession of the premises *as assignees* and not otherwise, and that the company were estopped from denying, as against the plaintiffs, that they were assignees of the lease. The Court of Appeal upheld this decision upon the ground that it was plain that the defendants had done a good deal in the nature of attorning tenant to the plaintiffs, and certainly had asserted impliedly, if not expressly, that they were the lessor's tenants as legal assignees of the term. The lessor company had therefore been induced to alter its position for the worse by allowing their original tenant to remove his goods and the company to put its goods upon the premises. There was therefore abundant evidence upon which the County Court Judge could draw the inference of an estoppel. Such a case as this must be carefully distinguished from one where there are no such circumstances giving rise to an estoppel. It must be borne in mind that a mere equitable assignment of a lease is not sufficient to create privity of estate between the lessor and the assignee. In order to render an equitable assignee liable upon the covenants of a lease, there must be some such conduct on his part as was found in this case, so that he is estopped from denying his liability upon the covenants.

Covenant for Quiet Enjoyment.—Matania v. *The National Provincial Bank, Ltd., and the Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633, raised a question of liability upon a qualified covenant for quiet enjoyment. The plaintiff leased the second floor of a building from the bank, who gave a covenant for quiet enjoyment in the form that the lessee paying the rent and performing the covenants should "quietly enjoy the said premises during the said term without any lawful interruption or disturbance from or by the lessors their heirs executors administrators or assigns". The bank leased the first floor to the second defendants,

who obtained permission from the bank and the head lessor to make extensive alterations, subject to the consent being obtained of all the sub-lessees. Without obtaining the plaintiff's consent, the second defendants instructed contractors to do work which caused a considerable nuisance to the plaintiff by reason of noise and dust, preventing him from carrying on his work of teaching singing. In an action for nuisance and breach of covenant, the Court of Appeal held that so far as the bank was concerned there was no breach by them of their covenant for quiet enjoyment, although they found that a nuisance was caused by the second defendants.

The ground of this decision was that the bank's consent to the alterations was subject to a condition which was not fulfilled, and consequently the act of the lessee was unauthorised. If the lessors had authorised the act giving rise to the nuisance, then there would have been a breach by them of their covenant for quiet enjoyment. It was laid down in *Sanderson* v. *Berwick-on-Tweed Corporation* (1884), 13 Q. B. D. 547, that it is a breach of the covenant if the ordinary and lawful user of the demised land is substantially interfered with, although neither the title to the land nor the possession of it is otherwise affected. But the interference must be by a person whose act is covenanted against by the lessor. It is well established that upon the usual qualified covenant the lessor is not liable for a nuisance caused by another of his lessees, even though he knows the latter is causing the nuisance, and takes no steps to prevent it. Active participation is necessary on his part before he can be held liable for the nuisance upon his covenant for quiet enjoyment. This was laid down in *Malzy* v. *Eichholz*, [1916] 2 K. B. 308. There the covenant was in a somewhat wider and very common form, against any interruption or disturbance by the lessor or any person or persons claiming from, through, or under him. The principle would therefore appear to apply all the more strongly to a case where, as in *Matania* v. *The National Provincial Bank, etc.*, the covenant makes no mention of persons claiming under the lessor.

It must be observed that this case does not lay down that a lessor can never, in such circumstances as arose here, be liable upon his covenant for quiet enjoyment. Every covenant must be construed in the light of the words used. This is a valuable decision upon the usual restricted type of covenant, but does not prevent a lessor covenanting in very wide and unrestricted language which might render him liable for a nuisance caused by an unauthorised act of another lessee. It must be remembered that by express words to that effect a lessor may covenant even against

the wrongful acts of strangers, although in the absence of express words the law will not imply such a covenant.

Rent Act Points.—Two recent decisions have settled important points in connection with the Rent Acts.

Heginbottam v. *Watts*, [1936] 2 K. B. 6; 105 L. J. K. B. 337, C. A., establishes that since the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the onus lies upon the tenant of a dwelling-house to show that the house is still controlled, and not upon the landlord to show that the house has become decontrolled. Section 1 (2) of that Act provides that as from September 29, 1933, the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of that Act or then formed part of such a dwelling-house, and is also a dwelling-house of which either the annual amount of the recoverable rent or the rateable value on the appointed day (April 6, 1931, in London) did not exceed a specified amount. In *White* v. *Bembridge*, [1935] 1 K. B. 244, the Court of Appeal had already decided that the words of the sub-section are an overriding statement of the law, restoring the relationship of landlord and tenant to the contract made between the parties unless the tenant can establish that the case falls within the proviso. Until *Heginbottam* v. *Watts*, however, it was not generally appreciated that this principle applies with equal force to " Class C " dwelling-houses, where the rateable value (if in London) does not exceed £20 a year. The Court of Appeal has now made it clear that in all cases it is for the tenant to prove affirmatively that the house is still controlled. He must show (a) that the Rent Acts applied to the house immediately before the passing of the 1933 Act, and (b) that either the rent or the rateable value does not exceed the specified figure. To satisfy head (a) the tenant must show that the house was one which came within the scope of the Rent Acts and had never, before the passing of the 1933 Act, become decontrolled, by the landlord regaining actual possession or otherwise. The effect of section 2 (2) of the 1933 Act is this : where the landlord of a " Class C " dwelling-house produces a certificate of decontrol, the burden is then on the tenant to prove that the house never became decontrolled before the passing of the 1933 Act by the landlord having possession or granting a lease of two years or more to the tenant, under section 2 of the 1923 Act; but if the landlord of a " Class C " house does not produce such a certificate, the tenant need only prove (a) that the house would have been controlled but for the provisions of

section 2 of the 1923 Act, and (b) that the landlord did not within the prescribed time make application for registration. Then the house is deemed to be controlled.

Strood Estates Co., Ltd. v. *Gregory*, [1936] W. N. 204; 80 S. J. 405, decided a point of difficulty in the definition of "net rent". The landlords desired (amongst other things) to make an increase of rent of 40 per cent. of the "net rent" under section 2 (1), clauses (c) and (d), of the 1920 Act. By section 12 (1) (c) of that Act, the expression "net rent" means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on the occupier, the standard rent less the amount of such rates. In fact, the landlords paid a compounded rate in accordance with the Poor Rate, etc., Act, 1869, s. 4, and the Public Health Act, 1875, s. 211. They contended that the "net rent" was the standard rent less the amount of the compounded rate. The Court of Appeal held, however, that the expressions "rates chargeable" and "the amount of such rates" in section 12 of the 1920 Act referred to the full amount of the rate as assessed and not the compounded rate, so that the "net rent" was the standard rent less the full amount of the rate.

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3. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

The Rule in Re Pettit.—In *Re Kingcome, Hickley* v. *Kingcome*, 52 T. L. R. 268; 15 A. T. C. 37, a testator's widow was entitled by his will to an annuity of £365 "clear of all death duties and income tax" and payable in priority to various other annuities directed to be paid by the trustees. The income of the trust fund, though sufficient to cover the widow's annuity, was insufficient to pay the other annuitants in full. The widow had no income other than her annuity. Had she exercised her right to claim repayment of tax in respect of the allowances due to her, the tax repaid would have been held by her in trust for the trustees and would thus have been available for satisfying the claims of the other annuitants—*Re Pettit*, [1922] 2 Ch. 765. She refused, however, to make any repayment claim.

Held, that the widow was a trustee of the statutory right to

repayment of tax and was bound, upon the request of the trustees, to make a repayment claim.

Section 25 of the Income Tax Act, 1918.—In *Jones* v. *Down*, 15 A. T. C. 218, in 1915, X handed over certain stock receipts to Y, stating that he desired the stock to be held by Y and Z in trust to accumulate the dividends and to transfer the stock to Y's daughter, A, when she married, or came of age. Y and Z subsequently signed a memorandum in which they declared that they held the stock "in trust to accumulate the dividends thereon and transfer the capital to [A] when she shall marry or attain twenty-one years, whichever shall first happen". A came of age in 1933 and claimed repayment of tax under section 25 of the Income Tax Act, 1918, for the period of eighteen years from 1915.

Held, that A's interest was vested and not contingent; that the claim was consequently inadmissible, since section 25 applied only in the case of beneficiaries whose interest in the income was a contingent and not a vested interest; and that since A's interest was a vested interest, the trustees could have made a repayment claim on A's behalf in the usual way in respect of the income as it arose.

"*Without deduction of income tax.*"—In *Re Williams*, *Williams* v. *Templeton*, 15 A. T. C. 51, a testator had by his will provided (*inter alia*) as follows: "My trustees . . . shall set aside out of my residuary trust estate such proportion thereof as shall be sufficient to provide an income of £1,000 per annum (without deduction of income tax) and shall pay such income," etc.

It had been held by Luxmoore, J., that the sum to be set aside was a sum which would produce by its income a sum of £1,000 before any income tax was deducted from it.

Held, allowing the appeal, that "'without deduction of income tax' means there is to be a clear net sum and no deduction of income is to be made from it", and, with reference to a question raised as to the rate of income tax to be assumed in determining the sum to be set aside, that "all the trustees have to do is to set aside a sum which *at that time* would produce £1,000 after income tax had been paid".

As to the meaning of the words "at that time", it was held by Luxmoore, J., that the proper time for the setting aside of the fund was the expiration of one year from the testator's death. The decision of the learned Judge on this point was not referred

to by way of approval or otherwise in the judgments in the Court of Appeal.

"*Clear of all deductions for taxes.*"—In *Shrewsbury and Talbot (Countess of)* v. *Commissioners of Inland Revenue*, 15 A. T. C. 267, under certain private Acts of Parliament and a jointure deed made in pursuance thereof, the appellant was entitled to two yearly rentcharges of £1,500 each, "Clear of all deductions whatsoever whether for taxes or otherwise."

These rentcharges had in the years to which the appeal related been paid out of income of the estate charged with income tax.

In *Re Shrewsbury Estate Act*, [1924] 1 Ch. 315, it was held that the rentcharges "are respectively payable free of income tax (other than super-tax)".

The question before the Court was whether, in the computation of the appellant's total income for surtax purposes, the aggregate amount of the rentcharges must be taken to be the net amount of £3,000 or the amount which would, after deduction of income tax, result in a payment of £3,000.

It was unsuccessfully contended on behalf of the appellant that the effect of the private Acts was that the annuity was one which enjoyed a statutory freedom for deduction by the trustees; that the true analogy was a case in which a person who had covenanted to pay an annuity of £3,000 *simpliciter* refrained from exercising his right to deduct tax; and that here, as there, the amount of the annuity must for surtax purposes be taken to be the fixed amount and no more.

Held, affirming the decision of the Special Commissioners, that the effect of the private Acts was "to grant these jointures free of income tax in the sense that the annuitant must be taken for the purposes of super-tax [surtax] to have received the amount of the annuity and the amount of the tax thereon which had been discharged by the trustees".

Annual payment or instalment of capital.—In *Dott* v. *Brown*, 154 L. T. 484; 15 A. T. C. 147, Y owed X a debt of between £9,000 and £10,000. Bankruptcy proceedings against Y were compromised on terms embodied in an agreement between the parties. The agreement provided that X should accept in settlement of his claim :—

(a) All Y's 5,000 preference shares in a certain company.

(b) The assignment of the full benefit of a certain deed of covenant.

(c) "The covenant of the debtor to pay £1,000 on the 31st March, 1933, £1,000 on the 31st March, 1934, and £250 on each succeeding 31st March so long as the petitioner should live—such covenant to bind the debtor's estate after his death."

(d) The debtor to undertake to procure the transfer of the above-mentioned shares to be registered.

The terms of the agreement were carried out down to March, 1935, and the two payments of £1,000 each were duly made. In making the first payment of £250, Y deducted income tax. X brought an action against Y to recover the amount so deducted.

Held, reversing the decision of Lawrence, J., that the presumption was that the consideration for the liquidation of Y's debt would be a capital payment of the same kind as the debt itself, unless the transaction made it clear that an annuity was being bought by the release of the debt; that there was nothing in the facts of the case to rebut this presumption; that because the payments were to terminate on Y's death it did not follow that the parties intended to substitute an income annuity for a capital instalment; and that the payment of £250, no less than the payments of £1,000, was an instalment of capital and not an annual payment from which income tax was deductible.

Advances to beneficiaries by trustees.—In *Williamson* v. *Ough*, 105 L. J. K. B. 193; 15 A. T. C. 38, the effect of a testator's will was that the income of his residuary estate was divisible equally between his wife and his three daughters. Clause 16 of the will provided as follows :—

"During the life-time of my wife my trustees may at their discretion make payment on account of income to the persons for the time being entitled to the income of the trust-fund, notwithstanding that my trustees may have no available income in their hands or not sufficient for the purpose, but such payments in advance of income received shall not exceed £500 for each quarter of a year in respect of each share of income, and such payments may be made out of any money for the time being in the hands of the trustees whether representing capital or income of the trust-fund, but so that the same shall be duly charged against income and any payment made out of capital shall so far

as practicable and as and when my trustees shall think proper be duly recouped."

The trustees were further empowered to raise any sum or sums for any purpose of or under the will, including the payment under the above-mentioned provisions of any sums in advance of income, by mortgage or charge of any part or parts of his estate.

The income of the trust fund having become seriously reduced, the trustees (with the authority of an order of the Court) raised a loan on the security of certain trust investments and out of the proceeds of the loan made certain payments to one of the daughters. On these payments the recipient was assessed to income tax under Case III of Schedule D. It was contended on her behalf that what she had received was not income but money lent to her by the trustees out of capital.

Held, affirming the decision of the Court of Appeal, that on the true construction of clause 16 of the will, the only recoupment to be made was a recoupment out of future income at the discretion of the trustees; that the appellant was under no personal liability to repay the advances; and that the payments were none the less income in her hands because they were made out of the corpus of the trust fund or out of moneys raised by charging a part of the corpus.

CONVEYANCER'S NOTEBOOK.

Orders for compulsory registration—registration in Middlesex.—The Land Registration Act, 1936, to which assent was given on July 14, 1936, mainly concerns the question of provision of the fund for meeting indemnities arising from any claim under the State guarantee of title including provision for meeting the indemnity arising from bills acquired by adverse possession; see the article on the Act as a Bill contained in *The Conveyancer* for May of this year.

Attention may here be drawn to two other matters which have more effect on the practitioner. Under section 1 of the Act, which appears to forecast a more speedy application of orders for compulsory application of the Act, it is provided that the words " and not more than eighteen months before the date on which it is to take effect " are to be omitted from section 122 which relates to the procedure for making orders for compulsory registration otherwise than at the instance of a county council. It may be remembered that it has been explained more than once that one of the difficulties facing compulsory application is the necessity of having a proper map and that this takes times and from the nature of things must be a little uncertain. It is thought that without this provision an order may be made to take effect at a date in the future to be ascertained by another order requiring less formality and consequently made with greater rapidity at a time when the exact date of completion of the required map is ascertained. This, however, is only hazarding a guess.

The other matter is more immediate and takes effect, as it were, at once. Under section 2 it is not permissible to register a memorial of any document in the Middlesex Deeds Registry that is dated after " the appointed day "; that is January 1, 1937, at which compulsory registration in Middlesex becomes effective. Furthermore (sub-section 3) no memorial of any document, whenever executed, may be registered more than two years after January 1, 1937, but nothing in the sub-section affects the consequences of failure to register. Fortunately, the stringency of this provision is modified by the fact that actual notice of an unregistered docu-

ment prevents it from being defeated by registration of a later registered instrument in Middlesex (*Le Neve* v. *Le Neve* (1747), 3 Atk. 646), and *probably* therefore effect would have to be given to it, if disclosed, on application for compulsory registration. It is further provided (sub-section 4) that nothing in the foregoing prevents the entry of any discharge of a mortgage in the Deeds Registry within two years of January 1, 1937, but not after that date. The position after December 31, 1939, remains rather obscure since it cannot have been the intention to compel registration of title for the purpose of discharging a mortgage. It is suggested that the effect is that payment of the mortgage will discharge the mortgage under section 114 or section 116 of the Law of Property Act, 1925, and effect is given thereto without any entry of satisfaction on any register, and a purchaser would be entitled to registration of his title, which will, of course, be compulsory, without any note of the mortgage appearing on the title. This view is enhanced by the next sub-section (5) which provides that after January 1, 1937, no search shall be made in the Deeds Registry save by the officials of the Land Registry.

The general effect of sub-section 5 is not obvious though every practitioner will be relieved to be rid of the necessity for making the tedious and tiresome searches in the Middlesex Registry. In investigating a title after the appointed day and before the title has been registered the practitioner will, presumably, rely on his examination of deeds marked with the stamp of the Deeds Registry, but in order that he may not be affected by any deeds not on the abstract presumably the Registry will issue some form of official search since it is not clear that the provisions of the Middlesex Deeds Act constituting registration the equivalent of actual notice have been repealed. No doubt, rules for this will be issued in due course.

Official Searches of the Index Map in London.—(i) The Chief Land Registrar announces a further improvement just brought into operation in the service of the Registry in London.

(ii) Up to the present an application for an official search of the index map in London under rule 286 of the Land Registration Rules, 1925, had to be accompanied by a copy of or extract from the Ordnance map on the largest scale published together with a fee of 5s.—a procedure somewhat burdensome to solicitors and comparatively expensive. Acting under his general discretion the Chief Land Registrar has now arranged that official searches of the index map in the administrative county of London to ascertain

whether land is registered or not or whether there are any cautions or priority notices against first registration, shall be made without fee and without a plan, provided that such a description of the land to be searched on the index map is given (*e.g.* by road number) as will enable the land to be identified thereon. The application for search need be in no special form. It should be made by post and will be answered by return of post.

(iii) A similar service has been in operation in Eastbourne and Hastings since those areas became compulsory areas.

(iv) The Chief Land Registrar regrets that a similar service cannot be extended to non-compulsory areas as the Land Registry maps in such areas are not necessarily up-to-date nor are all road names in such areas indexed in the Registry.

Tithe.—Attention should be called to the fact that the Tithe Bill has now become an Act converting tithe into a form of annuity, but its provisions are too complicated to be dealt with in this place. It is intended to deal with the conveyancing aspects of this Act in detail at an early date.

Advantages of registration of title.—During the month of August there has issued from the Land Registry a pamphlet (price 1s.) advocating the advantages to land owners of voluntary registration of title. This deals in a very short form with the comparative advantages of registration and the disadvantages of unregistered conveyancing. It includes by way of appendix specimens of a Land Certificate, Transfer and Charge, and also the fees and charges of solicitors. The pamphlet should be studied carefully. The subject of registered land has not received from practitioners the attention it deserves and if the method is really to confer the boons claimed for it these claims must be examined closely and suggestions made for improvements of the system which being human cannot be perfect. It is intended to deal with this pamphlet in more detail in the next number.

Housing.—Practitioners should notice that the Housing Act, 1936, has now been passed. This is primarily a consolidating Act and the number of amendments are few and not important.